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CARING AUTONOMY: RETHINKING THE RIGHT TO
AUTONOMY UNDER THE EUROPEAN COURT OF HUMAN
RIGHTS JURISPRUDENCE

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TABLE OF CONTENTS

ACKNOWLEDGMENTS	5
DECLARATION.....	6
ABSTRACT	7
INTRODUCTION.....	8
CHAPTER 1 CHOOSING AUTONOMY	19
1.1. INTRODUCTION.....	19
1.2. CHOOSING AUTONOMY – THE EUROPEAN COURT OF HUMAN RIGHTS IN BETWEEN CARING, PRINCIPLED AND INDIVIDUAL AUTONOMY	25
1.2.1 <i>Overlooking caring autonomy</i>	26
1.2.2 <i>Discarding principled autonomy</i>	31
1.2.3 <i>Choosing individual autonomy</i>	37
1.3. WHAT INFORMS THE ECtHR? – THE ORIGINS OF THE LEGAL CONCEPT OF INDIVIDUAL AUTONOMY	43
1.3.1 <i>The “living instrument” argument</i>	44
1.3.1.1 Autonomy and social change	48
1.3.2 <i>The ECHR: a system in constant dialogue</i>	52
1.3.2.1 Autonomy in the domestic arena	54
1.3.2.2 Autonomy and the comparative method	56
1.3.3 <i>Back to the future</i>	60
1.3.3.1 The object and purpose of the Convention: A libertarian bill of rights?	62
1.4. CONCLUSION	67
CHAPTER 2 EXPRESSIONS OF INDIVIDUAL AUTONOMY	69
2.1. INTRODUCTION.....	69
2.2. LEGAL IMAGES OF AN AUTONOMOUS PERSON	72
2.2.1 <i>When the other is on the way</i>	73
2.2.1.1 <i>Evans v the United Kingdom</i>	73
2.2.1.2 Autonomous person – detached and independent	76
2.2.1.3 Autonomous person – self-sufficient and in control	80
2.2.2 <i>When the other is ignored</i>	82
2.2.2.1 <i>Dickson v the United Kingdom</i>	83
2.2.2.2 <i>S.H. and others v Austria</i>	86
2.2.3 <i>Implications of an impoverished view of the individual</i>	91
2.3. TOWARDS AN ADVERSARIAL MODEL OF PERSONAL RELATIONSHIPS	91

2.3.1	<i>Tysic v Poland</i>	92
2.3.1.1	Protecting individual autonomy through effective decision-making processes	94
2.3.1.2	Autonomous individual in action.....	98
2.3.2	<i>Implications for relationships</i>	100
2.4.	CONCLUSION	102
CHAPTER 3 AUTONOMY, INDIVIDUALISATION AND THE EMERGENCE OF TRUST		
.....		104
3.1.	INTRODUCTION.....	104
3.2.	INDIVIDUAL AUTONOMY AS THE NORMATIVE RESPONSE TO THE PROCESSES OF INDIVIDUALISATION	108
3.2.1	<i>Autonomy as the positive aspect of individualisation</i>	108
3.2.2	<i>Autonomy as the negative aspect of individualisation</i>	112
3.3.	SHIFTING FOUNDATIONS OF INTERPERSONAL RELATIONSHIPS AND THEIR CONSEQUENCES FOR INDIVIDUALS	115
3.3.1	<i>Changes in family life and marriage</i>	115
3.3.2	<i>Autonomy claims – dealing with uncertainty</i>	119
3.3.2.1	Reproduction and tensions in autonomy.....	119
3.4.	EMERGENCE OF THE IMPORTANCE OF TRUST	126
3.5.	CONCLUSION	130
CHAPTER 4 AUTONOMY, LAW AND TRUST		132
4.1.	INTRODUCTION.....	132
4.2.	AN OVERVIEW OF TRUST	134
4.2.1	<i>Nature and significance of trust</i>	135
4.2.2	<i>Placing and responding to trust</i>	139
4.3.	LAW AND TRUST.....	140
4.3.1	<i>Law as the source of decrease in trust</i>	142
4.3.1.1	Loss of “organic” trust.....	144
4.3.1.2	New grounds for distrust	147
4.3.2	<i>Law as the source of increase in trust</i>	149
4.4.	INDIVIDUAL AUTONOMY AND TRUST IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS.....	152
4.4.1	<i>The centrality of (dis)trust in the practice of the European Court of Human Rights</i> ...	153
4.4.1.1	<i>Reklos and Davourlis v Greece</i>	154
4.4.1.2	<i>Ternovszky v Hungary</i>	157
4.4.2	<i>Increasing trust by increasing control and accountability</i>	160
4.4.2.1	<i>R.R. v Poland</i>	161
4.4.2.2	Doctors do not deserve trust	163
4.4.3	<i>Betrayal of trust</i>	166

4.4.3.1	Broken promises and untruthfulness	167
4.4.3.2	Trust and deception.....	170
4.5.	CONCLUSION.....	173
CHAPTER 5 CARING AUTONOMY.....		175
5.1.	INTRODUCTION.....	175
5.2.	THE ETHICS OF CARE AND SOME CONCERNS ABOUT ITS USE AND USEFULNESS IN THE HUMAN RIGHTS DISCOURSE.....	177
5.2.1	<i>What is the ethics of care?</i>	178
5.2.2	<i>The incompatibility of human rights adjudication and the ethics of care</i>	182
5.2.3	<i>The ethics of care as an exclusively female morality</i>	185
5.2.4	<i>Relationships subsume the individual</i>	188
5.2.5	<i>Vagueness of care</i>	192
5.2.6	<i>Interim conclusions</i>	194
5.3.	DEFINING CARING AUTONOMY	194
5.3.1	<i>Not independence, but interdependence</i>	196
5.3.2	<i>The virtues of care</i>	198
5.4.	IMPLEMENTING CARING AUTONOMY IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS.....	202
5.4.1	<i>Revisiting Pretty v the United Kingdom</i>	202
5.5.	CONCLUSION	207
CONCLUSION.....		208
BIBLIOGRAPHY		214
TABLE OF CASE LAW		229

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This thesis is dedicated to my parents. Without their love and support, this thesis would have never been attempted nor completed.

DECLARATION

This is to certify that that the work contained within has been composed by me and is entirely my own work. No part of this thesis has been submitted for any other degree or professional qualification.

Katri Lõhmus, 30th of November 2012

ABSTRACT

This thesis sets out an argument against the present interpretation of the concept of autonomy under the European Court of Human Rights (the ECtHR) Article 8 jurisprudence and proposes a new reading of the concept that is rooted in an acknowledgment and appreciation of human interdependence.

Following the prevailing political, legal and socio-cultural ideas and ideals about autonomy, the ECtHR has chosen to furnish its recent Article 8 case law according to the values characteristic of the notion of individual autonomy – independence, self-sufficiency, and the ability to conduct one's life in a manner of one's own choosing. Adopting this individualistic view on autonomy, the ECtHR sets normative standards for behaviour that the thesis challenges as being detrimental for the quality of interpersonal relationships. The work draws on sociological theory to argue that in modern individualised societies people are increasingly tied to each other – one has to be socially sensitive and to be able to relate to others and to obligate oneself, in order to manage and organise the complexities of everyday life. This also means that there are attendant obligations between individuals to be sensitive towards, and care for, each other. It is argued that an effective exercise of one's autonomy becomes necessarily dependent on the existence of caring and trusting relationships. This in turn requires the ECtHR to adopt an appropriate conceptualisation of autonomy that embraces this knowledge and gives full effect to it. The concept of caring autonomy is proposed as a replacement for an individualistic concept of autonomy. It will be argued that this concept captures better the essentiality of human interdependence and the morality it calls for. The implications of this for the future direction of the ECtHR jurisprudence are also considered.

INTRODUCTION

One of the defining characteristics of human rights law in recent decades has been its relentless expansion. At least in Western countries the assertion of rights is thriving.¹ The expansion of human rights is typically seen as highly desirable, if not a necessary condition of human development.² The vast body of international and domestic human rights law created in the last few decades is seen by many as the formal expression of normative changes that place human rights near the top of the political agenda and the individual person at the centre of the public life. The new order can be seen to represent “power to the people” in that human rights offer the oppressed, the excluded, and the victims of tyrannical governments, an opportunity to gain the “moral high ground” in the struggle for emancipation and freedom.³ In a way human rights have become the yardstick by which to measure human progress⁴ and, therefore, any additional identification and acknowledgment of an individual right is generally taken as a celebratory progress in human rights protection.⁵

¹ The supervisory organ of the European Convention on Human Rights – the European Court of Human Rights – has been even declared to be a “victim of its own success.” See R. Ryssdal, “The coming of age of the European Convention on Human Rights”, (1996) 1 *European Human Rights Law Review* 18-29, at 26; L.R. Helfer, “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime”, (2008) 19 *European Journal of International Law* 125-159, at 125. According to the European Court of Human Rights website, in 2011 64,500 new applications were presented to the Court. In January 2012 the Court was confronted with an accumulated case-load of 151,600 applications. Available at http://www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATS_EN_2011.PDF.

² L. Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA*, OUP, 2007, at xi.

³ T. Evans, “International Human Rights Law as Power/Knowledge”, (2005) 27 *Human Rights Quarterly* 1046-1068, at 1065.

⁴ M. Cartabia, “The Age of ‘New Rights’”, *Straus Working Paper 03/10*, available at <http://nyustra.org/index.html>, at 2.

⁵ See a publication issued by the United Kingdom Human Rights Lawyers’ Association and the Law Society on the anniversary of 10 years of the Human Rights Act. See http://www.conorgearty.co.uk/pdfs/Pamphlet_HRA_10_Years_On.pdf (30.12.2010).

However, at the same time when individuals and groups have become used to state almost every interest they have in terms of rights,⁶ the rights are penetrating all areas of human interaction,⁷ and the courtrooms are overloaded by new and unprecedented pleas,⁸ some concerns and feeling of discomfort towards rights have started to rise. Although few want to deny the importance of individual rights, many scholars have recently complained that their importance has been greatly overemphasised.⁹ Some say that the inflation of rights threatens the credibility of and the moral status of human rights.¹⁰ A related worry is that the greater the number of rights recognised, the more likely they will begin to contradict one another.¹¹ And finally, and most importantly for this thesis, there is the worry that, although, the purpose of human rights might have been noble, putting the individual at the centre of political and social life, but unfortunately, the result is an excessive individualism and a society of self-centred individuals.¹²

The critics are concerned that while the human rights discourse makes claims for the pursuit of human dignity and freedom, it also provides the context where the individual, set apart from others and threatened by a society, state or government, creates social relations characterised by selfishness, gain and private interests, rather than the pursuit of human dignity and community.¹³ Since rights are claimed by individuals, it is said, rights promote and encourage a community whose members think of social problems in the most narrow, self-interested terms. Crucially, the

⁶ Access to internet, for example, has been put forward as a human right. A. Wagner, "Is Internet Access a Human Right?", *The Guardian*, Wednesday, 11 January 2012.

⁷ Recently an idea that rights should regulate relationships between friends has been advanced. See E.J. Leib, *Friend v Friend*, OUP, 2011.

⁸ See e.g. Case of *Hatton and others v the United Kingdom* (App.36022/97), Judgment of 8 July 2003. The applicants in *Hatton* submitted that the sleep disturbance, distress and ill health caused by night flights at Heathrow airport was a violation of their right to private life under Article 8 of the European Convention on Human Rights.

⁹ For a general overview on the criticisms of rights see C.R. Sunstein, "Rights and Their Critics", (1995) 70 *Notre Dame Law Review* 727-768; See also M. Cartabia, note 4 above.

¹⁰ P. Alston, "Conjuring up new human rights: A proposal for quality control", (1984) 78 *American Journal of International Law* 607-621; T. Campbell, "Human Rights: A Culture of Controversy", (1999) 26(1) *Journal of Law and Society* 6-26.

¹¹ L. Zucca, note 2 above.

¹² J.H.H. Weiler, "The political and legal culture of European integration: An exploratory essay", (2011) 9(3-4) *International Journal of Constitutional Law* 678-694, at 693.

¹³ M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, The Free Press, 1991; M.J. Sandel, *Liberalism and the Limits of Justice*, 2nd ed, CUP, 1998; R. Dagger, *Civic Virtues: Rights, Citizenship and Republican Liberalism*, OUP, 1997.

insistence on rights has not resulted in a warmer and more caring society.¹⁴ We should be less concerned with our rights and more concerned with our responsibilities, the argument goes.¹⁵

In his critique against the practice of European institutions, Joseph Weiler, for example, argues that while “we brandish human rights, with considerable justification, as one of the important achievements of our civilization,”¹⁶ the result is, paradoxically, “the matrix of personal materialism, self-centredness, Sartre style ennui and narcissism in a society which genuinely and laudably values liberty and human rights.”¹⁷ Following Weiler, the human rights vocabulary seems now to be frequently “lost-in-translation.”¹⁸ The inviolability of human dignity has become “the inviolability of the ‘I’, of the ego.”¹⁹ Since the language of rights, Weiler argues, “is not conducive to the virtues and sensibility necessary for real community and solidarity” and “it undermines somewhat the counterculture of responsibility and duty,” the culture of human rights “may produce unintended consequences on that very deep ideal that places individual at the centre and calls for redefinition of human relations.”²⁰

Similarly, Marta Cartabia, in her criticism against the enlarging number and scope of the new privacy rights that are now blooming in European courtrooms, raises concerns over whether liberal individual rights do not just offer an impoverished image of the human subject, but whether they also affect our human agency, our social behaviour: “Rights require not hurting others, but they do not prompt a positive move towards others: they fall short of encouraging care and concern about others.”²¹

¹⁴ J.H.H. Weiler, “Europe – Nous coalisons des États, nous n’unissons pas des hommes”, available at <http://www.iilj.org/courses/documents/2009Colloquium.Session9.Weiler.pdf>, at 27; M. Cartabia, note 4 above, at 31.

¹⁵ M.A. Glendon, note 13 above, at 76-108.

¹⁶ J.H.H. Weiler, note 14 above, at 27.

¹⁷ J.H.H. Weiler, note 14 above, at 32.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ J.H.H. Weiler, note 14 above, at 31.

²¹ M. Cartabia, note 4 above, at 31.

These criticisms contain the seeds of inspiration for this thesis. They point to exploring and questioning whether the expansion of human rights is always a good thing. Are certain rights always appropriate in certain contexts? Are human rights always generating positive effects in the societies in which they are so highly valued? From a different angle they raise questions about the importance of the vocabulary of the human rights language and its impact on shaping the relationships we are involved in and the society we live in. Does the language of human rights sometimes cause such “unintended consequences” in terms of the behaviour of individuals, thereby making it problematic for a harmonious and caring social co-existence?

Whereas these kind of concerns and questions may seem somewhat familiar within the United States of America scholarship, where the idea of a constitutional right to privacy involving decisional autonomy and covering intimate personal decisions and relationships has animated the public debate for decades now, scrutinising its descriptive accuracy and normative desirability,²² it is a relatively unexplored territory in the context of the European human rights jurisprudence. Nearly all those offering commentary on the case law of the supervisory organ of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter also the ECHR or the Convention), the European Court of Human Rights (hereafter also the ECtHR or the Court), have viewed the inclusion of new rights or the broad interpretation of old ones as beneficial to the development of the Convention and to the human rights protection in general.²³ The main question is how wide the scope or nature of one or another right is. As far as the criticism goes, the critics have been mostly concerned with the worry that the judges of the ECtHR will exercise illegitimate judicial discretion if they interpret the Convention in a creative way.²⁴ Critical questions about the underlying normative purposes and

²² See e.g. M.A. Glendon, note 13 above; M.J. Sandel, note 13 above; J.L. Cohen, *Regulating Intimacy: A New Legal Paradigm*, Princeton University Press, 2002.

²³ See e.g. J. Marshall, *Personal freedom through human rights law? Autonomy, identity and integrity under the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2009.

²⁴ See e.g. L.R. Helfer, “Consensus, Coherence and the European Convention on Human Rights”, (1993) 26 Cornell International Law Journal 133-165.

effects of the Convention rights have remained, however, modest or completely unaddressed.²⁵

Against this background this thesis asks about the value and justification of the concept of autonomy as interpreted by the European Court of Human Rights under its Article 8 jurisprudence.²⁶ The thesis inquires whether the concept of autonomy as expressed in the Court's reasoning is an appropriate model for interpersonal relationships. It asks about the potential impact that the practice of the Human Rights Court, expressed and shaped though its autonomy-based case law, has on the dispositions or behaviour of the individuals, and from there on, on the social relationships these individuals are involved in.

I think that it is of utmost importance to ask these kinds of questions in the context of the practice of the Human Rights Court. It is informed by the idea that law is part of the cultural environment that shapes and impacts the dispositions and behaviour of those operating within its sphere.²⁷ In other words, the thesis rests on the premise that besides law's regulatory functions, it also has expressive functions that can serve as conveying or promoting socially valued attitudes, norms and mores. This is to make a difference between what the law says as opposed to what it does.²⁸ While the former affects behaviour "expressively" by making statements, the latter controls behaviour directly by its sanctions.²⁹ Or to put it in another way, it is to say that "law has an expressive influence on behaviour independent of the effect created by its sanctions."³⁰ Of course, as Jason Mazzone notes, law often makes statements and controls behaviour at the same time: in regulating individuals, law also expresses what sort of behaviour is appropriate for them or those similarly situated. But even

²⁵ One of the excellent exceptions is M-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, CUP, 2006. Dembour reviews five critiques of rights – the realist, utilitarian, Marxist, particularist and feminist critique – and explores how their insights are reflected in the case law of the European Court of Human Rights.

²⁶ Article 8 provides for a right to respect for private and family life, home and correspondence.

²⁷ J.H.H. Weiler, note 14 above, at 6.

²⁸ R.H. McAdams, "An Attitudinal Theory of Expressive Law", (2000) 79 *Oregon Law Review* 339-390, at 339.

²⁹ C.R. Sunstein, "On the Expressive Function of Law", (1996) 144 *University of Pennsylvania Law Review* 2021-2053, at 2024.

³⁰ R.H. McAdams, note 28 above, at 339.

when it is mixed with regulation, an element of expression may nonetheless be present – and worthy of separate analysis.³¹

In its expressive functions the law, then, can be seen essentially as instrumental for instilling certain values into the citizens and providing “guidance” for how to behave according to these values.³² McAdams claims that law changes behaviour by signalling the underlying attitudes of a community or society, and “because people are motivated to gain approval and avoid disapproval, the information signalled by legislation and other law affects their behaviour.”³³

Following this, we can start to see the Human Rights Court performing what the theorists call “law’s expressive functions:” the ECtHR judgments going beyond telling parties how they must behave and making statements that potentially have a more general effect in terms of change in their behaviour. From this perspective, through the implementation of autonomy in its case law, the Human Rights Court defines human relations, the way individuals relate to each other and to their community, sometimes apart from the direct outcomes of a particular case for the parties concerned. The way the Human Rights Court interprets autonomy is, hence, crucial to our normative understanding about how to relate to each other in interpersonal relationships, to our perceptions to matters of life and death, and what we should expect from ourselves and from the state.

During the five decades of its existence,³⁴ the Court has been the primary instrument in interpreting the rights and freedoms defined in the Convention.³⁵ For many the ECHR system represents a success-story of individuals’ human rights protection,³⁶ upholding the “strongly developed European value system, concretized by the ECHR

³¹ J. Mazzone, “When Courts Speak: Social Capital and Law’s Expressive Function”, (1999) 49 *Syracuse Law Review* 1039-1066, at 1040.

³² L.A. Kornhauser, “No Best Answer?”, (1998) 146 *University of Pennsylvania Law Review* 1599-1637, at 1624.

³³ R.H. McAdams, note 28 above, at 340.

³⁴ The first members of the ECtHR were elected by the Consultative Assembly of the Council of Europe in 1959. The first session of the Court took place in 23-28 February 1959.

³⁵ The ECHR was opened for signature in Rome on 4 November 1950 and entered into force in September 1953. Text available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

³⁶ L.R. Helfer, note 24 above; A. Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe”, (2000) 54(2) *International Organizations* 217-252, at 218-219; L.R. Helfer, A-M. Slaughter, “Toward a Theory of Effective Supranational Adjudication”, (1997) 107 *Yale Law Journal* 273-391, at 276, 293-297.

and the jurisprudence of the ECtHR”.³⁷ The growing and diverse body of case law is said to have transformed Europe’s legal and political landscape.³⁸ Many European states have – indirectly or directly – incorporated the Convention into domestic law, whereby the domestic constitutional jurisdictions are informed by the values emerging from the Convention rights. The analysts note that the legal commitments and enforcement mechanisms entered into under the ECHR have established such a consistent compliance that “ECHR judgments are now as effective as those of any domestic court.”³⁹ Consequently the Convention has become to represent an “abstract constitutional identity”⁴⁰ for the entire European continent and the ECtHR has effectively become the constitutional court for greater Europe.⁴¹

Indeed the Court itself has interpreted the Convention not as a set of reciprocal promises among nations, but as a “constitutional instrument of European public order”.⁴² In the light of these observations, it is important to take notice of the high relevance this institutional human rights framework enjoys as a legal restraint and influence for the forty-seven contracting states, and more importantly, for the lives of more than eight hundred or so million people that live in Europe. As such, the Court must be regarded as one of the most important mechanisms in Europe through which normative ideas about human rights are both formulated and applied. As Mowbray argues, judgments from Strasbourg have resulted in nothing short of the “evolution of societies”.⁴³ Given the growing body of literature referring to the constitutional character of the ECHR and its role as an instrument of the European value system

³⁷ E. de Wet “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order”, (2006) 19 *Leiden Journal of International Law* 611-632, at 611.

³⁸ L.R. Helfer, note 1 above, at 126. C. Douzinas, *Human Rights and Empire*, Routledge-Cavendish, 2007, at 25. Douzinas argues that the Convention introduced a radical innovation that has changed legal civilisation. Traditional international law a states-based law with no place for individuals. But under the ECHR, aggrieved Europeans after exhausting the domestic remedies can submit an application to the ECtHR alleging that their rights have been violated by the actions of their state. In the course of the judicial investigation the plaintiff is put on an equal footing with the defendant state. At the end of the process, the state is obliged to comply with any adverse findings of the Court.

³⁹ A. Moravcsik, note 36 above, at 218.

⁴⁰ S. Greer, “What’s Wrong with the European Convention on Human Rights?”, (2008) 30 *Human Rights Quarterly* 680-702, at 684.

⁴¹ Ibid.; See also S. Greer, *The European Convention on Human Rights*, CUP, 2006.

⁴² Case of *Loizidou v Turkey* (App.15318/89), Judgment of 23 March 1995, para 27.

⁴³ A. Mowbray, “The Creativity of the European Court of Human Rights”, (2005) 5(1) *Human Rights Law Review* 57-79, at 79.

(European public order) whose norms correspondingly include a strong ethical underpinning, the decisions of the ECtHR contribute undoubtedly both to the integration of its norms into states' positive law, and most importantly for present purposes, to the formation of individuals' value systems.⁴⁴

If the Human Rights Court holds that the right to autonomy applies in a variety of interpersonal relationships, including that of reproduction, assisted suicide and abortion, the real-world consequences may be much smaller than is conventionally thought. But the attention European society pays to the Court's pronouncements is connected to the expressive or symbolic character of these pronouncements. When the Court makes a decision, it is often taken to be speaking on behalf of the nations' basic principles and commitments. The expressive effect of the Court's judgments, or its expressive function, is often at stake here.⁴⁵ As Jeremy Waldron argues: "society does not become well-ordered by magic. The expressive disciplinary work of law may be necessary as an ingredient in the change of heart on the part of its citizens that a well-ordered society presupposes."⁴⁶

I consider it, therefore, of utmost importance to discuss and analyse the significance and power of the concept of autonomy in modern European human rights law. Law is a powerful means of structuring human relations, and it is also an important way in which concepts like autonomy take shape in the world. Thus, when the Human Rights Court chooses a concept of autonomy to decide cases under its Article 8 jurisprudence, it, simultaneously, articulates principles that constrain and influence how we construct our interpersonal relationships. The principles and values that the Court expresses and legitimises assume, in this way, an aspirational function regarding how we think individuals should orient their behaviour.⁴⁷ The obvious appeal and frequent invocation of personal autonomy in cases pertaining to various interpersonal relationships make it, therefore, essential to better understand the

⁴⁴ See e.g. E. Wicks, "The Rights to Refuse Medical Treatment under the European Convention on Human Rights", (2001) 9 *Medical Law Review* 17-40, at 19-20;

⁴⁵ C.R. Sunstein, note 29 above, at 2028.

⁴⁶ J. Waldron, "*Dignity and Defamation: The Visibility of Hate*", (2010) 123 *Harvard Law Review* 1597-1657, at 1623.

⁴⁷ R.H. McAdams, note 28 above; C.R. Sunstein, note 29 above; J. Mazzone, note 31 above.

workings of the particular concept of autonomy that the ECtHR has chosen to endorse as a human right.

My argument presented in this thesis is the following. The thesis argues that the concept of individual autonomy – the ability to conduct one’s life in a manner of one’s own choosing – that the ECtHR has adopted to interpret the guarantees provided by Article 8, provides an impoverished image of the human condition and is an inappropriate model to regulate interpersonal relationships in the contexts of reproduction or medical decision-making. The thesis considers it to be potentially detrimental for the quality of interpersonal relationships in these areas. It is further argued that in modern individualised societies, where people are increasingly uncertain and insecure about the actions of others, an effective exercise of one’s autonomy becomes necessarily dependent on the existence of caring and trusting relationships. This entails the appreciation that there are attendant obligations between individuals to be sensitive towards, and care for, each other. This, in turn, requires the ECtHR to adopt an appropriate conceptualisation of autonomy that embraces this knowledge and gives full effect to it. The concept of caring autonomy is proposed as a replacement for an individualistic concept of autonomy. It will be argued that this concept better captures the essentiality of human interdependence and the morality it calls for.

The thesis is presented in five substantive chapters.

Chapter 1 examines the meaning and origin of the concept of autonomy as adopted by the Human Rights Court. It is argued that whereas it seemed like an uncontroversial choice for the Court to choose the concept of individual autonomy as the underlying principle for the interpretation of Article 8 guarantees, this consensus might be misplaced. Nothing in the Convention system prescribes that individual autonomy is fundamentally linked to Article 8 or that it was the only choice available to the Court. As the analysis shows, two other concepts of autonomy – caring autonomy and principled autonomy – have been, albeit implicitly, considered by the ECtHR.

Chapter 2 considers whether the decision of the Human Rights Court to choose individual autonomy to furnish its Article 8 case law is justified. The central claim in

this chapter is that the individual autonomy-based practice now developing under the European Court of Human Rights Article 8 jurisprudence (a) fosters a particular type of individual – an independent and isolated yet active and flexible individual with a self-protective stance towards others around him or her, and; (b) directs human relations into formalism and proceduralism guided by contract-based models of interaction. It is argued that since one's personal sphere is very often, in one way or another, closely interconnected with that of family members, friends, etc., promoting the virtues of an isolated individual potentially turns human relations to non-emotional, calculated places of alienation and combat. The concept of individual autonomy is, hence, found to be ethically inadequate with potentially detrimental consequences to interpersonal relationships.

Chapter 3 argues that the concept of individual autonomy is inadequate to regulate interpersonal matters from the social perspective – interdependence rather than independence, in-insufficiency rather than self-sufficiency, characterises the way we organise and deal with the complexities of everyday life. Drawing from sociological literature, it is argued that by advocating an image of a self-sufficient individual, the Human Rights Court has misunderstood what it means to live in a highly individualised society. In an increasingly individualised world, one has to be socially sensible and to be able to relate to others and to obligate oneself, in order to manage and organise the complexities of everyday life. This also means that there are attendant obligations between individuals to be sensitive towards, and care for, each other. The capacity for autonomous life becomes increasingly dependent on the existence of trusting relationships.

Chapter 4 evaluates the capacity of individual autonomy to establish and foster trust-promoting practices. Considering the somewhat sceptical view towards law's capacity to enhance trust, the chapter first explores the relationship between trust and law. Although it is rather common to perceive trust and law as opposites, it is suggested that a more appropriate approach is to treat them as complements. Law can positively support trust and encourage good behaviour through its expressive functions. Based on a critical analysis of the ECtHR autonomy-related case law, the chapter concludes that the particular legal regulation – as established by autonomy-

related case law through the reasoning of the Human Rights Court – is more likely to result in reduction of trust rather than increase in trust in interpersonal relationships. In other words, the individualistic concept of autonomy is considered to be an inadequate component for dealing with lack of trust and needs to be reconsidered.

Chapter 5 proposes that in order to cultivate practices of trust, to enhance social cohesion and strengthen trustworthiness in interpersonal relationships, the European Court of Human Rights should take the approach of advocating the language of caring autonomy – a concept of autonomy informed by the insights of the ethics of care. Building on the works of care ethicists, caring autonomy is based on the idea that we are both, unique, autonomous individuals and at the same time embedded in nested dependencies. It sees free choice and moral obligations and responsibility as complementary to each other and thus mutually interdependent.⁴⁸ Caring autonomy that does not deny the importance of the values of independence and self-determination, but regards equally highly qualities of attentiveness, responsiveness and empathy in autonomous decision-making, is argued to be a better basis for building trust in interpersonal relationships.

⁴⁸ A.I. Tauber, “Sick Autonomy”, (2003) 46(4) *Perspectives in Biology and Medicine* 484-495, at 490.

CHAPTER 1

CHOOSING AUTONOMY

1.1. Introduction

Respect for personal autonomy is not expressly articulated in any of the substantive rights guaranteed by the European Convention on Human Rights. Despite this absence in the written text of the Convention, over the past decade there has emerged a developing body of case law where autonomy features in the European Court of Human Rights language either as an important principle underlying the interpretation of the Article 8 guarantees¹ or as a right of its own under Article 8 jurisprudence.² The supervisory organ of the European Convention on Human Rights now regularly uses the term *autonomy* when deciding cases about assisted dying, sexuality and reproductive rights; matters pertaining to one's identity, self-determination, fulfilment of choices, and control over one's body and mind. Accordingly, choices about when and how to die,³ whether to become or not to become a parent,⁴ and how far should the State's responsibility reach in providing appropriate services in order

¹ Case of *Van Kück v Germany* (App.35968/97), Judgment of 12 June 2003; Case of *Gillan and Quinton v the United Kingdom* (App.4158/05), Judgment of 12 January 2010. Article 8 states the following:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

² Case of *Kalacheva v Russia* (App.3451/05), Judgment of 7 May 2009; Case of *R.R. v Poland* (App.27617/04), Judgment of 26 May 2011.

³ Case of *Pretty v the United Kingdom* (App.2346/02), Judgment of 26 April 2002; Case of *Haas v Switzerland* (App.31322/07), Judgment of 20 January 2011; Case of *Koch v Germany* (App.497/09), Judgment of 19 July 2012.

⁴ Case of *Evans v the United Kingdom* (App.6339/05), Judgment of 10 April 2007; Case of *Dickson v the United Kingdom* (App.44362/04), Judgment of 18 April 2006.

to become a parent⁵; to what extent a person is entitled to control her image⁶ and to have a say in deciding her nationality,⁷ have become claims about one's autonomy in human rights language.⁸ In a word, within a decade, autonomy has become a notional basis for a cluster of causes of action that the Court captures under the diverse field of application of Article 8 of the European Convention on Human Rights. The tendency to recognise more rights and to interpret existing rights more broadly has provoked some commentators even to argue that an autonomy-based understanding of human rights, at least implicitly, now underlies much contemporary thinking in human rights law.⁹ A publication available on the Human Rights Court's website that is meant to help applicants to qualify their claims, explains the scope of Article 8 accordingly: "Article 8 seeks to protect three areas of *autonomy* – private life, family life and one's own correspondence."¹⁰

While the European Court of Human Rights now regularly uses the term *autonomy* when deciding cases under its Article 8 jurisprudence, and the judges of the Strasbourg Court as well as the commentators of its case law treat autonomy as an important legal value, none of these institutions or personnel fully explains what it means. There is a wide literature on autonomy in legal, moral and political philosophy¹¹ and in medical law and ethics,¹² but as a human rights concept, autonomy's content is much less researched. This is explicable, on the one hand, due

⁵ Case of *S.H. and others v Austria* (App.57813/00), Judgment of 3 November 2011.

⁶ Case *Reklos and Davourlis* (App.1234/05), Judgment of 15 January 2009.

⁷ Case of *Ciubotaru v Moldova*, (App.27138/04), Judgment of 27 April 2010.

⁸ The latest additions to 'autonomy' case law include: Case of *Jehovah's witnesses of Moscow v Russia* (App.302/02), Judgment of 10 June 2010; Case of *Vördur Olafsson v Iceland* (App.20161/06), Judgment of 27 April 2010; Case of *Neulinger and Shuruk v Switzerland* (App.41615/07), Judgment of 6 July 2010.

⁹ K. Möller, "Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights", (2009) 29(4) *Oxford Journal of Legal Studies* 757-786.

¹⁰ Available at http://www.echr.coe.int/NR/rdonlyres/F6DC7D2E-1668-491E-817A-D0E29F094E14/0/COURT_n1883413_v1_Key_caselaw_issues_Art_8_The_Concepts_of_Private_and_Family_Life.pdf

¹¹ Key literature includes: J.B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy*, CUP, 1998; G. Dworkin, *The Theory and Practice of Autonomy*, CUP, 1988; C. Mackenzie, N. Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, OUP, 2000; J.S. Taylor (ed), *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy*, CUP, 2005.

¹² See e.g. O. O'Neill, *Autonomy and Trust in Bioethics*, CUP, 2002; S.A.M. McLean, *Autonomy, Consent and the Law*, Routledge-Cavendish, 2010; C. Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law*, Hart Publishing, 2009; A.I. Tauber, *Patient Autonomy and the Ethics of Responsibility*, The MIT Press, 2005.

to the very recent addition of the concept to the European human rights jurisprudence. On the other hand, it seems that the importance of autonomy and its inclusion in the European human rights law has been taken somewhat for granted, leaving the need for detailed reflection upon its meaning unimportant. Since the landmark decision in *Pretty v the United Kingdom*¹³ in which the European Court of Human Rights first explicitly adopted an autonomy-based reasoning of Article 8 rights – covering the right to conduct one’s life in a manner of one’s own choosing – autonomy’s conceptual and normative presuppositions have largely remained unquestioned and unchallenged. Apart from some brief remarks within case notes such as on how the import of autonomy into Article 8 “threatens to stretch unreasonably its bounds,”¹⁴ the overall reaction among academics to the inclusion of autonomy has been relatively calm acceptance.¹⁵ Yes, the expansion of Article 8 rights was noted, but it was nothing the commentators were surprised by or hesitant about. Autonomy is, and has always been, they seemed to assume, a natural element

¹³ Case of *Pretty v the United Kingdom* (App.2346/02), Judgment of 26 April 2002.

¹⁴ J. Keown, “European Court of Human Rights: Death in Strasbourg – assisted suicide, the *Pretty* case, and the European Convention on Human Rights”, (2003) 1 *The International Journal of Constitutional Law* 722-730, at 729.

¹⁵ That is not to say that the different ethical and legal issues surrounding autonomy in these cases did not provoke a healthy feedback. See e.g.: H. Biggs, “A Pretty Fine Line: Life, Death, Autonomy and Letting It B”, (2003) 11 *Feminist Legal Studies* 291-301; R. English, “Autonomy and the Human Rights Convention”, (2002) *New Law Journal* 152; H.J.J. Leenen, “Assistance to Suicide and the European Court of Human Rights”, (2002) 9 *European Journal of Health Law* 257-281; B. Hewson, “Abortion in Poland: A New Human Rights Ruling”, (2007) *Conscience* 34-35; S.H.E. Harmon, N. Sethi, “Preserving Life and Facilitating Death: What Role for Government after *Haas v Switzerland*?”, (2011) 18 *European Journal of Health Law* 355-364. Perhaps especially popular among the commentators, providing thought-provoking material about the meaning and place of autonomy in bioethics and human rights law, was *Evans v the United Kingdom*. See e.g.: S. Sheldon, “Revealing Cracks in the ‘Twin Pillars’?”, (2004) 16 *Child and Family Law Quarterly* 437; J.K. Mason, “Discord and Disposal of Embryos”, (2004) 8(1) *Edinburgh Law Review* 84-93; A. Alghrani, “Deciding the Fate of Frozen Embryos”, (2005) 13 *Medical Law Review* 244-256; T. Annett, “Balancing Competing Interests Over Frozen Embryos: The Judgment of Solomon?”, (2006) 14 *Medical Law Review* 425-433; C. Lind, “*Evans v United Kingdom* – Judgment of Solomon: Power, Gender and Procreation”, (2006) 18 *Child and Family Law Quarterly* 576; S. Chan, M. Quigley, “Frozen Embryos, Genetic Information and Reproductive Rights”, (2007) 21(8) *Bioethics* 439-448; C. Morris, “*Evans v United Kingdom*: Paradigms of Parenting”, (2007) 70 *Modern Law Review* 992-1002; A. Smajdor, “Deciding the Fate of Disputed Embryos: Ethical Issues in the Case of *Natallie Evans*”, (2007) 4 *Journal of Experimental and Clinical Assisted Reproduction* 2; K. Wright, “Competing Interests in Reproduction: The Case of *Natallie Evans*”, (2008) 19 *King’s Law Journal* 135-150.

of the Convention, something to be contained and protected under Article 8¹⁶ or even under some other article of the Convention.¹⁷

This general agreement on autonomy's instinctive place in the Convention system is coupled with the consensus on the values inherent in the concept of autonomy. The common opinion seems to say that when the ECtHR uses autonomy, it invokes the liberal individualistic notion of it.¹⁸ Pursuant to this view – and also conceded by this chapter – autonomy under the ECtHR practice means that each individual has the right to choose how to be and become the kind of person she wants to be, and to have her own self-chosen lifestyle. Autonomy is about living a self-authored life: living according to values that are one's own. As such, the protection of autonomy rights is often seen as a true and noble aspiration, one of the positive aspects of modern society, based as it is on the notion of the emancipation of the individual.¹⁹ The individual person with his or her needs and desires becomes the central motif.²⁰ Its idealistic resonance makes it an attractive cause with which to be identified. Who could disagree with the aim and promise to empower people to make decisions for themselves in the context of abortion, reproduction or assisted suicide?²¹

¹⁶ A. Pedain, "The Human Rights Dimension of *Dianne Pretty Case*", (2003) 62(1) *Cambridge Law Journal* 181-206, at 189; J. Coggon, "Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism" (2007) 15 *Health Care Analysis* 235-255, at 237.

¹⁷ J. Marshall, "A right to personal autonomy at the European Court of Human Rights", (2008) 3 *European Human Rights Law Review* 337-356, at 338; G. Gomery, "Whose autonomy matters? Reconciling the competing claims of privacy and freedom of expression", (2007) 27(3) *Legal Studies* 404-429; S. Sorial, "Free Speech, Autonomy, and the Marketplace of Ideas", (2010) 44 *Journal of Value Inquiry* 167-183; E. Wicks, "The Rights to Refuse Medical Treatment under the European Convention on Human Rights", (2001) 9 *Medical Law Review* 17-40.

¹⁸ See e.g. A. Campbell, H. Lardy, "Transsexuals – the ECHR in Transition?", (2003) 53(3) *Northern Ireland Legal Quarterly* 209-253, at 215; S. Wheatley, "Human Rights and Human Dignity in the Resolution of Certain Ethical Questions in Biomedicine", (2001) 3 *European Human Rights Law Review*, 312-325, at 313; L. Loucaides, "Personality and Privacy under the European Convention on Human Rights", in *Essays on the Developing Law of Human Rights*, Martinus Nijhoff Publishing, 1995, at 175; S. Cowan, "The Headscarf Controversy: A Response to Jill Marshall", (2008) 14 *Res Publica* 193-201, at 195.

¹⁹ B. de Vries, L. Francot, "Information, Decision and Self-Determination: Euthanasia as a Case Study", (2009) 6(3) *SCRIPTed* 558-574, at 559.

²⁰ M. Cartabia, "The Age of 'New Rights'", *Straus Working Paper 03/10*, available at <http://nyuStraus.org/index.html>, at 10.

²¹ This is not to ignore the various, mostly communitarian and feminist, criticisms against autonomy and rights culture in general. However, these criticisms have animated public debate mostly in the United States. In Europe the critique of human rights is still rather limited.

The aim of this chapter is to start to shake up the somewhat “sacred” status the concept of individual autonomy holds in the Western liberal thought. The main purpose here is to abstract the Human Rights Court’s Article 8 jurisprudence from its paradigmatic assumption about autonomy having just one core meaning – that of individual autonomy. My central claim is that individual autonomy is not the only possible concept of autonomy the Human Rights Court could have – or indeed, should have – chosen to regulate intimate matters in interpersonal relationships. As the next chapters argue, the individualistic concept of autonomy is in several ways problematic and, in the end, an inappropriate tool to regulate interpersonal relationships in the contexts of, e.g. reproduction or medical decision-making. It structures human relations into a contract-based form, where values of independence and self-sufficiency are paramount (Chapter 2). Drawing from sociological literature, it will be further argued that advocating an image of the self-sufficient individual misunderstands what it means to live in a highly individualised society. In an increasingly individualised world, one has to be socially sensible and to be able to relate to others and to obligate oneself, in order to manage and organise the complexities of everyday life. This also means that there are attendant obligations between individuals to be sensitive towards, and care for, each other. The capacity for autonomous life becomes increasingly dependent on the existence of trusting relationships (Chapter 3). In this thesis it is argued that this kind of insight requires the ECtHR to adopt an appropriate form of autonomy that embraces this knowledge. But as I claim, the capacity of individual autonomy to establish and foster trust-promoting practices is inadequate (Chapter 4). The concept of *caring autonomy*, as I develop in the last chapter of the thesis (Chapter 5), is proposed to be better suited to capture the essentiality of human interdependence and the morality that it calls for.

In the present chapter, I will begin the argument by demonstrating that in addition to individual autonomy, two other concepts of autonomy have been, albeit implicitly, considered by the ECtHR. This discussion serves three core purposes. First, it challenges the assumption that only one core meaning of autonomy can be of relevance under the European human rights law. Second, it shows how each concept of autonomy emphasises different values. We have different conceptions of autonomy based on how we choose to think about the individual, the individual’s

relationships to others and about wider community. Each of these forms of autonomy, thus, represents and expresses different values about the individual and her relationship to others around her, values that have important consequences when autonomy is used as a justification for human rights. Following from that, third, it makes it clear that when the ECtHR uses autonomy to substantiate its judgments, it simultaneously chooses a particular way of organising relationships. By choosing a particular concept of autonomy, the Human Rights Court guides us to behave in certain ways that are deemed appropriate for an autonomous person, and, correspondingly to guide us away from other behaviours towards each other which, I argue, are far more representative of social practices, human expectations and moral obligations.

The second part of the chapter deals with the question of whether the Court had any real choice to adopt any other concept than that of individual autonomy. As the supervisory organ of an international treaty, the Court is bound to follow certain interpretation methods and techniques when furnishing the open-ended Convention articles. In the context of autonomy rights, three of those methods are relevant: dynamic interpretation, comparative interpretation and interpreting the Convention in the light of its object and purpose. It will be argued that although they all provide convincing explanations of why individual autonomy is the most obvious choice to furnish the Article 8 jurisprudence, the argument that individual autonomy is intrinsic to Article 8 rights is nonetheless unjustified. Nothing in the Convention system prescribes that individual autonomy is fundamentally linked to Article 8 or that it is the only choice available to the Court. Rather, the three interpretative methods should be seen as guiding the Court to choose and defend a concept of autonomy that is responsive to the challenges of the modern Western societies; that is open, yet critical to the concepts of autonomy adopted in different context and different jurisdictions; and that embraces the whole picture of the object and purpose of human rights protection.

1.2. Choosing autonomy – The European Court of Human Rights in between caring, principled and individual autonomy

A common opinion says that autonomy's inclusion into the European human rights law began with the ground-breaking decision of *Pretty v the United Kingdom*.²² Based on “an important extension of Article 8,” the commentators noted the case as “the first foundation for a specific legal right to autonomy in law.”²³ In fact, some rated “autonomy”, and how far it extends in law, as highly as the key issue of the case.²⁴

In many ways these scholars are right. *Pretty* did become the most authoritative case and precedent concerning the development of the subsequent autonomy-related ECtHR case law,²⁵ and it introduced the particular content the Court attributed to the concept – that of individual autonomy. However, I aim to challenge the – largely implicit – assumption that the concept of autonomy as articulated in *Pretty* was the only option available to the Court. I want to suggest that before opting to endorse the concept of individual autonomy as the “ability to conduct one’s life in a manner of one’s own choosing,”²⁶ for the purposes of solving the issues under Article 8 jurisprudence, two other possible concepts of autonomy presented themselves first. These are what I will call, hereinafter, *caring autonomy* and *principled autonomy*.

At the heart of caring autonomy is the centrality of relationships and the understanding that we are all interdependent on each other. Caring autonomy entails acting in ways that are guided by the ethics of care – fulfilling commitments that

²² Case of *Pretty v the United Kingdom* (App.2346/02), Judgment of 26 April 2002.

²³ J. Montgomery, “Law and the Demoralisation of Medicine”, (2006) 26 *Legal Studies* 185-210, at 208; B. Rudolf, “European Court of Human Rights: Legal Status of Postoperative Transsexuals”, (2003) 1(4) *International Journal of Constitutional Law* 716-721, at 719.

²⁴ H. Biggs, note 15 above, at 297.

²⁵ Among others see: Case of *Van Kück v Germany* (App.35968/97), Judgment of 12 June 2003, para 69; Case of *Campagnano v Italy* (App.77955/01), Judgment of 23 March 2006, para 53; Case of *E.B. v France* (App.43546/02), Judgment of 22 January 2008, para 43; Case of *Daróczy v Hungary* (App.44378/05), Judgment of 1 July 2008, para 32; Case of *S. and Marper v the United Kingdom* (App.30562/04 and 30566/04), Judgment of 4 December 2008; Case of *Schlumpf v Switzerland* (App.29002/06), Judgment of 8 January 2009, para 100; Case of *S.H. and others v Austria* (App.57813/00), Judgment of 1 April 2010, para 58; Case of *Kurić and others v Slovenia* (App.26828/06), Judgment of 13 July 2010; Case of *R.R. v Poland* (App.27617/04), Judgment of 26 May 2011.

²⁶ *Pretty v the United Kingdom*, para 62.

particular contexts of relationships require and that form the basis for the existence of trusting relationships.²⁷ Principled autonomy requires acting on certain sorts of principles that can be principles or laws for all, measured by reference to some purportedly universal standard of values. Principled autonomy is based on Kantian philosophical treatment of autonomy as dignity.²⁸

It is important to differentiate between these different understandings of autonomy since each of them reflects different ways of thinking about what constitutes autonomy as a legal matter. Different concepts of autonomy reflect different underlying perceptions about individuals and their relationship to others around them; i.e. about what autonomy demands from us and from others. As such, the discussion serves as part of the groundwork for this thesis for choosing and defending a concept of autonomy that best responds to and suits the contemporary challenges regarding interpersonal relationships and decisions within those domains. In other words, it is a starting point for my endeavour to think about what concept of autonomy is most suitable to conceptualise interpersonal relationships and, in the end, the wider social community. Within these lines we can start to evaluate what autonomy means and should mean in European human rights law.

In the paragraphs that follow, I will show how the jurisprudence on autonomy within the ECtHR did not, in fact, begin with *Pretty*, nor, indeed, with a conceptualisation of individual autonomy. Rather, I will show that before *Pretty* there is evidence that the Court could have gone another way, that is, that it recognised elements of caring and principled autonomy as briefly defined above. This suggests that the current conceptualisation of autonomy need not be the last word from the ECtHR, nor should it be – as the rest of this thesis will argue.

1.2.1 Overlooking caring autonomy

The very first judgment of the European Court of Human Rights in which the term “autonomy” occurred, was the case of *Johansen v Norway*,²⁹ where the applicant

²⁷ The essence of the ethics of care and its main features are discussed more thoroughly in Chapter 5.

²⁸ O. O’Neill, note 12 above, at 83; J. Coggon, note 16 above, at 240.

²⁹ Case of *Johansen v Norway* (App.17383/90), Judgment of 7 August 1996.

disputed the authorities' decision to take her daughter into care and deprive her of parental rights. Without attaching to the notion of personal autonomy any direct legal meaning in the context of the applicant's Article 8 rights, the Court considered the notion of personal autonomy as an important aspect of a child's development. A safe and stable environment was crucial to developing a healthy personhood. Considering the rather incidental use of the concept of autonomy in the reasoning of this judgment, it would be arbitrary to draw much out of it in terms of the Court's position towards the concept of autonomy. Crucially, the case never became an authority in terms of the Court's interpretation of "autonomy". I propose, however, that the circumstances of the case, and the occurrence of the concept of autonomy in this context, presented the Court with a good opportunity to articulate more clearly about autonomy in terms of interdependence rather than independence, and about the necessity of constructive and trusting relationships for autonomy to flourish throughout one's life. Regrettably the idea of caring autonomy remained underdeveloped in the Court's reasoning, but it was nonetheless present and recognised for the purposes of human rights protection.³⁰

In December 1989 the applicant gave birth to her second child, baby daughter S. At that point in her life, Ms Johansen, had had a rather complicated past. She had given birth to her first child, a son, when she was very young. She had then lived with a man who mistreated her and her son. On several occasions the social welfare authorities were involved to assist her in the upbringing of her son, who at one point was placed in children's psychiatric clinic for treatment and was thereafter temporarily sent to a foster home. In the meanwhile the relationship between the welfare authorities and the applicant did not evolve in good terms. When baby daughter S was born, the authorities decided that it was in the child's best interest to be taken provisionally into care. The authorities considered that the applicant's physical and mental state of health did not allow her to take proper care of her daughter. Pursuant to the further examination of the case, the welfare authorities

³⁰ For a short analysis about whether the ECtHR has in its overall case law accommodated a perspective which reflects the ethics of care see M-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, CUP, 2006, at 197-201. Dembour's conclusion is that very little trace can be found of such ethics in the Strasbourg case law.

recommended that the baby be placed in a foster home with a view to adoption and to deprive the applicant of all her parental responsibilities. The Oslo City Court, overseeing the case, decided to uphold the recommendations. The applicant's daughter was placed with foster parents and Ms Johansen did not have any access to her baby from that point forward. Before turning to the Human Rights Court, all Ms Johansen's appeals against the care decision and the deprivation of parental responsibilities were rejected. Crucial to these decisions was not whether the applicant was now in a better position to take care of her child – all instances agreed that Ms Johansen's situation had improved considerably – but whether it would be in the child's best interest to be removed from the foster home to live with her mother. The domestic courts relied heavily on the experts' arguments that reuniting mother to her child in this case would destroy the security, stability and the stimulating conditions the foster home provides for the child and, therefore, it would not be in the child's best interest to be returned to her mother's care. An important passage of an expert's opinion presented in the domestic proceedings and later also relied on by the ECtHR read as follows:

As the child was in the middle of a phase of development of personal autonomy, it was crucial that she live under secure and emotionally stable conditions, such as obtained in the foster home. In short term there can be no doubt that the child would react with sorrow and emotion if she were now to be removed from her foster home. In the long run it is likely that if she were removed at this stage of her development she would carry with her into her future life an experience of insecurity *vis-à-vis* other people, including those who represent close and dear relations.³¹

The ECtHR, deciding the case under an alleged violation of Article 8, considered that there was an interference of the applicant's right to respect for family life, but that the taking of the applicant's daughter into care and the maintenance in force of the care decision was based on reasons which satisfied Article 8(2) requirements.³² The Court followed the welfare authorities' assessment about Ms Johansen being uncooperative with them concerning her son's upbringing and her own treatment, and therefore, that there was a high probability that the applicant was unfit to take

³¹ *Johansen v Norway*, para 27 and 72.

³² *Johansen v Norway*, para 73.

proper care of her daughter. In support of the argument that it was in the child's best interest to stay in the foster home, the Court agreed, again, with the domestic authorities that returning the child to her mother would entail a particular risk to her "development of personal autonomy."³³

As to the second strand of the complaint – the deprivation of parental rights and access – the Court found these measures, however, to be in violation of Article 8. Here, the Court took under consideration the improved conditions of the applicant's lifestyle; the fact that the short contacts she had had with her daughter right after her birth were conducted in a manner not open to criticism; and that the difficulties the welfare authorities had experienced with the applicant concerned mainly the upbringing of her son.³⁴ The complete deprivation of the applicant of her family life with her child was in the opinion of the ECtHR, accordingly, unjustified.

So what does this case say about autonomy? I think two points are especially important. First, throughout the decision the emphasis was on the protection of the development of the child's autonomy. The development of her autonomy is directly linked and dependent on the circumstances and lifestyle she lived in – most importantly, dependent on the people with whom she lived. Leaving aside the question to whether the mother's lifestyle conditions were actually such as to be detrimental to the development of the child's autonomy, I think the Court expressed here something fundamental concerning the notion of autonomy. In my perspective, what the Court said was that autonomy begins with an assumption of human connectedness. Human beings become who they are – their identities, their capacities, their desires – through the relationships in which they participate.³⁵ In other words, the surroundings and the relationships one is engaged in are crucial for the development of one's autonomy. As the case brings to light, a relationship with a

³³ *Johansen v Norway*, para 72.

³⁴ *Johansen v Norway*, para 82-83.

³⁵ In the academic literature this aspect of autonomy resonates in the writings of communitarian and feminist authors, who prefer to see autonomy in relational terms. At their heart is a "shared conviction ... that persons are socially embedded and that agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants." C. Mackenzie, N. Stoljar (eds), note 11 above, at 4. See also A. MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed, Gerald Duckworth & Co Ltd, 2007; J. Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, OUP, 2011.

parent can harm or encourage a child's autonomy. It is instrumental in forming the individual's desires, beliefs and emotional attitudes, and her capacity for self-reflection and self-knowledge.³⁶

This relational aspect of autonomy does not, however, apply only to the very young whose autonomy is clearly still in the phase of development. Although not explicitly expressed as such in the judgment, Ms Johansen's autonomy was quite similarly affected in this case. Her relationship with the welfare authorities had an important impact on her autonomy, on her chances to have a family life with her daughter. Having come from a troubled background herself, with an abusive partner and lack of education, questions can be raised whether the welfare system operated as such as to improve her chances to stay together with her daughter, or it was just "easier" for the authorities to deal with the situation by taking her child into care. In any case, what can be read from the judgment is that the relationship between the applicant and the welfare authorities lacked cooperation and trust. Ms Johansen's autonomy was to that extent limited.

This brings me to the second point that the case makes about autonomy. Namely, the concept of autonomy as it is used in the context of *Johansen* has a strong collaborative element.³⁷ An appropriate respect for one's autonomy will require those in position of responsibility, such as parents of young children, to respond sensitively to the experiential world of those in their care, to deploy their power and influence to restore and strengthen the autonomy of those they care for.³⁸ This suggests, for autonomy to flourish, the parties to the relationship have, depending on the context, corresponding duties and commitments to fulfil. Respect for the daughter's autonomy demanded that her mother take good care of her and constrain her decisions in tune with her daughter's safe upbringing. According to the domestic authorities and the ECtHR, the applicant did not or could not fulfil the obligations and responsibilities the mother-daughter relationship demanded when the baby was

³⁶ J. Herring, "Relational Autonomy and Rape", in S. Day Scalter et al. (eds), *Regulating Autonomy: Sex, Reproduction and Family*, Hart Publishing, 2009, at 57.

³⁷ I borrow this usage from A. Donchin, "Autonomy, Interdependence, and Assisted Suicide: Respecting Boundaries/Crossing Lines", (2000) 14(3) *Bioethics* 187-204.

³⁸ A. Donchin, note 37 above, at 191-192.

born. However, since the mother's health and living conditions had improved over the years, she was given by the Human Rights Court – I think rightly so – a chance to be reunited with her daughter. At this stage, again, the responsibilities of the welfare authorities arise to provide care and help for the mother to collaborate and assist her in this endeavour. Essentially, the duty of the welfare authorities can be seen as assisting her in enhancing her autonomy.

Essentially, what this case reveals is that an important part of the human condition is made of relationships, responsibilities and care. It acknowledges that without all those elements there can be no effective exercise of autonomy. It infers that the capacity for autonomous action entails the functioning of constructive and trusting relationships. If this is the case, then the job for the Human Rights Court in protecting one's autonomy is to find a way to facilitate these kinds of relationships. This implicit thinking about autonomy *Johansen* reveals must be made explicit, and must become the preferred way to conceptualise the protection of autonomy under the Convention.³⁹

1.2.2 Discarding principled autonomy

A year later, in *Laskey, Jaggard and Brown v the United Kingdom*,⁴⁰ the Court was confronted with the question whether the prosecution and conviction for physically injurious sadomasochistic acts, conducted privately among consenting adults, was in breach of Article 8. The form of autonomy that emerged from this case requires living in accordance to standards of rationality and morality that are shaped by the community. Autonomy here means guiding the individual and the society towards particular “dignified” choices. Although this particular concept of autonomy still figures occasionally in the dissenting opinion of the individual Judges of the ECtHR, it has never gained proper ground in the majority opinions. I agree in this respect with the majority. Principled autonomy has a strong backwards-looking aspect. It tries to (re)establish “traditional boundaries” that in a pluralistic era are neither social

³⁹ See Chapter 5.

⁴⁰ Case of *Laskey, Jaggard and Brown v the United Kingdom* (Apps.21627/93;21826/93;21974/93), Judgment of 19 February 1997.

nor cultural realities any more.⁴¹ It carries the risk where courts may try to uphold paternalistic policies that prevent individuals from choosing a vocation or a way of life that might be “undignified” in the view of those in the position of power.

The applicants in *Laskey* were members of a group of men who, over a period of ten years, engaged in activities involving the commission of violent acts against one another for the purpose of deriving sexual gratification from the giving and receiving of pain. All these activities – e.g. maltreatment of the genitalia (with, for example hot wax, sand paper, fish hooks and needles) and ritualistic beatings (using either bare hand or variety of implements, like stinging nettles and spiked belts) were consensual and were conducted in private for no apparent purpose other than the achievement of sexual gratification. In the course of investigation into other matters, the police came into possession of a number of video films, which were made during sadomasochistic encounters involving the applicants and some other homosexual men. As a result the applicants were charged with a series of offenses, including assault and wounding, convicted and sentenced to imprisonment. The applicants appealed, since they did not agree with the officials that their actions were criminal. Relying on Article 8 of the Human Rights Convention they argued that they had the right to express their sexual personality and that their conviction amounted to an unlawful and unjustifiable interference to their right to respect for their private life.

The Court, delivering the case, noted that “personal autonomy of the individual” was of consideration when drawing an appropriate boundary around the limits of state interference in situations “where the victim consents.”⁴² But clearly the Court was not quite comfortable in accepting that a reasonable individual would voluntarily and autonomously choose to participate in such sexual activities. Since neither of the parties disputed that prosecution and conviction for participation in sadomasochistic acts was an interference with the applicants’ rights to express their sexual personality, the Court could not find a reason to examine this question of its own motion. It seems, however, that the Court would have gladly liked to address this particular question, and possibly even to end the case as non-pertinent to one’s

⁴¹ More on this see Chapter 3.

⁴² *Laskey, Jaggard and Brown v the United Kingdom*, para 44.

private life. In any case, the Court found it necessary to point out that “not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8”⁴³ and it was “open to question” whether the activities of the applicants (which included the recruitment of new “members”, the provision of several specially equipped “chambers”, and the shooting of many videotapes which were distributed among the “members”) “fell entirely within the notion of “private life”.”⁴⁴

Judge Pettiti’s separate concurring opinion in this judgment perhaps expresses best the Court’s overall concerns. Judge Pettiti echoed first the majority’s statement that not “every aspect of private life automatically qualifies for protection under the Convention,” the “fact that the behaviour concerned takes place on private premises does not suffice to ensure complete immunity and impunity”, and that “not everything that happens behind closed doors is acceptable”. He went on to suggest that an appropriate use of Article 8 was one that enabled, regardless of sexual orientation, the “protection of a person’s intimacy and dignity, not the protection of his baseness or the promotion of criminal immorality.”⁴⁵

The majority of the Human Rights Court did not go as far as Judge Pettiti in their reasoning, holding back to judge the activities under question as outright undignified and immoral. By avoiding connecting the protection of autonomy to the participants’ presumably informed wishes, desires and aspirations,⁴⁶ the Court instead focused on the potential and actual seriousness of the injuries inflicted on the participants. Consequently, for reasons to protect the public health, the Human Rights Court unanimously found that there was no breach of the Convention. On occasions the Court described the acts, however, as (genital) torture,⁴⁷ arguably “undermining the respect which human beings should confer upon each other”,⁴⁸ and in no way “trifling or transient.”⁴⁹ Such immoral acts, the Court seemed to infer, could not

⁴³ *Laskey, Jaggard and Brown v the United Kingdom*, para 36.

⁴⁴ *Laskey, Jaggard and Brown v the United Kingdom*, para 36.

⁴⁵ *Laskey, Jaggard and Brown v the United Kingdom*, Concurring opinion of Judge Pettiti.

⁴⁶ C. Nowlin, “The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms”, (2002) 24 *Human Rights Quarterly* 264-286, at 284.

⁴⁷ *Laskey, Jaggard and Brown v the United Kingdom*, para 9 and 40.

⁴⁸ *Laskey, Jaggard and Brown v the United Kingdom*, para 40.

⁴⁹ *Laskey, Jaggard and Brown v the United Kingdom*, para 45.

violate someone's autonomy, because no autonomous person would choose to behave in those ways.⁵⁰

What the Court was arguably contemplating in this case was the idea that autonomy is ultimately tied with morality and it depends on specific ideals of appropriateness. Only those who display the desired traits of the model moral citizen are worthy of respect. This form of autonomy resonates best with what the academic literature has reflected as Kantian autonomy⁵¹ or what Onora O'Neill has termed principled autonomy.⁵² Principled autonomy is a form of autonomy that requires living in a certain way. It requires the person's decision-making to accord with some objective set of ideals⁵³ that are said to constitute the "good life" – that makes human life flourish as well as for the individual as for the community. Rooted in Kantian thought, principled autonomy requires agents to consider their reason for action, and only to pursue a course of action if it could be made a universal law. That is, if it could be a successful maxim for all agents to follow. Therefore, if a person chooses to act in a way that is incompatible with universalisable ideals, that person is not acting autonomously. Similarly to caring autonomy, discussed above, principled autonomy may require behaving, for example, with self-control, but this self-control is guided by standards of rationality and morality that are shaped by the community, not by the nature of particular relationships the individuals participate in, and by the responsibilities and attitudes that aim to foster trust in those relationships.

One of the obvious problems with principled autonomy is in determining what the "universal law" is. This approach seems to require some pre-existing assumptions about what amounts to ethical behaviour. In highly differentiated, pluralist, and

⁵⁰ *Laskey* has most often been read, and criticised, as a conservative indictment of private homosexual acts. See L.J. Moran, "*Laskey v the United Kingdom*: Learning the Limits of Privacy", (1998) 61 *The Modern Law Review* 77-84; C. Nowlin, note 46 above. A positive reading of this judgment is provided by Paul Johnson, who sees it as evidence of a more general willingness to extend the normative concepts of intimacy and dignity to (some) homosexual private behaviours and to deem them protectable. P. Johnson, "'An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights'", (2010) 10(1) *Human Rights Law Review* 67-97, at 78.

⁵¹ K. Veitch, *The Jurisdiction of Medical Law*, Ashgate, 2007, at 56; J. Coggon, note 16 above, at 240; C. Foster, note 12 above, at 7.

⁵² O. O'Neill, note 12 above.

⁵³ J. Coggon, note 16 above, at 240.

multicultural civil societies, a single overarching conception of the good, or a single substantive collective identity upon which we all agree is, however, hard to substantiate.⁵⁴ Probably, this is also one of the reasons why the proponents of principled autonomy determine what amounts to ethical behaviour with a tune of confidence, rather than providing explanations why certain acts are considered immoral or undignified. The underlying rationale seems to be here that “we” all know what the right thing is to do or what is best for everybody else.

For example, rejecting the arguments that seek to employ individual autonomy as a basis for gaining access to assisted reproductive techniques, O’Neill insists that

An adequate future for children and their long dependence must aim to ensure that each child is born not just to an individual who seeks to express himself or herself, but to persons who can reasonably intend and expect to be present and active for the child across many years.⁵⁵

Deciding who can be a responsible aspiring parent seems pretty straightforward and “prosaic” for O’Neill: it is whether there are reasonable grounds to think that any child brought into existence can expect to have at least an adequate future, and cared for by a “good enough” family.⁵⁶ According to O’Neill, a decision to reproduce would be “irresponsible” for single parents, those who are chronically ill or addicted, very young or very old, individuals without long-term and stable cohabitation and collaboration with others, and the incapable or uncommitted, since “childhood is long and life uncertain, and children need parents who are reliably present and active.”⁵⁷

O’Neill’s position echoes well in the dissenting opinion of *Dickson v the United Kingdom*.⁵⁸ The applicants of this case were husband and wife, Kirk (born in 1972) and Lorraine (born in 1958) Dickson. They met each other when they were both in prison through a prison pen-pal network. They got married and wanted to have children together. Since Kirk was serving a life sentence for murder and Lorraine

⁵⁴ J.L. Cohen, *Regulating Intimacy: A New Legal Paradigm*, Princeton University Press, 2002, at 49.

⁵⁵ O. O’Neill, note 12 above, at 62.

⁵⁶ *Ibid.*, at 67.

⁵⁷ *Ibid.*, at 62.

⁵⁸ Case of *Dickson v the United Kingdom* (App.44362/04), Judgment of 4 December 2007, Joint dissenting opinion of Judges Wildhaber, Zupančič, Jungwiert, Gyulumyan and Myjer.

was in her forties, they applied for facilities for artificial insemination. Their request was refused based on the argument to maintain the public confidence in the penal system and to protect the welfare of the child conceived. The Grand Chamber of the Human Rights Court decided, however, to uphold the complaint. The majority of the Judges of the Grand Chamber found that the Responding State placed a too high “exceptionality” burden on the complainants to justify their “exceptional” circumstances for being eligible for artificial insemination facilities.

The dissenting Judges were not satisfied with the Court’s reasoning. They especially criticised the Court for not taking into consideration the specific circumstances of the case – the couple established a pen-pal relationship while both were serving prison sentences; they had never lived together; there was a 14-year age difference between them; the man had a violent background; the woman already had three children from previous relationships and was at an age where natural or artificial procreation was hardly possible and in any case risky; and any child which might be conceived would be without the presence of a father for an important part of his or her childhood years.⁵⁹ In terms of principled autonomy, what the dissenting Judges were saying was that under these particular circumstances no responsible and reasonable parent could autonomously have chosen to have a child. Reasonable choice here would apparently “require more than mere forwarding of sperm from a distance in circumstances which preclude the donor from participating meaningfully in any significant function related to parenthood.”⁶⁰ Although clearly concerned about the welfare of the child, the dissenting Judges were simultaneously judgmental of the particular lifestyle and living conditions of the applicants. Perhaps it was not the intention of the Judges, but this kind of reasoning could carry the risk of becoming paternalistic and creating new forms of domination and privilege – only men and women who fit into certain standards are considered morally autonomous and worthy of protection.

⁵⁹ Joint dissenting opinion of Judges Wildhaber, Zupančič, Jungwiert, Gyulumyan and Myjer.

⁶⁰ *Dickson v the United Kingdom*, Concurring opinion of Judge Bonello.

1.2.3 Choosing individual autonomy

After *Laskey*, a somewhat similar problem recurred in front of the Strasbourg judges in 2002, in *Pretty v the United Kingdom*,⁶¹ where Dianne Pretty complained that her husband was not allowed by the English laws to assist her to die. Unlike in *Johansen* and *Laskey*, in this case the notion of personal autonomy was explicitly linked to the protection of Article 8 rights and with the corresponding analysis of the case. Given the widely held position to consider *Pretty* as the case to mark the introduction of the concept of autonomy into the ECtHR case law, and its status as one of the landmark cases for interpreting autonomy under the European human rights law, we can consider individual autonomy as expounded in this case as the Court's presently preferred choice of furnishing autonomy.

In November 1999 Mrs Pretty was diagnosed with motor neurone disease. Since then her condition deteriorated rapidly, leaving her paralyzed from the neck down. She had only months to live. She was frightened and distressed by the prospect of the cruel final stages of her disease, and in order to avoid that, she wished to be able to control how and when she died and thereby be spared known suffering and indignity.⁶² Yet because of her disease she was unable to end her life herself. She wanted help from her husband. Although he was allegedly willing to help his wife, it was a crime to assist somebody to commit suicide according to section 2(1) of the English Suicide Act 1961.⁶³ Hence the 1961 Act stood in Mrs Pretty's way to choose and decide when and how to die.

In her claim under the Article 8 rights,⁶⁴ Mrs Pretty submitted that Article 8 of the Convention guarantees the right to self-determination, encompassed by the right to

⁶¹ Case of *Pretty v the United Kingdom* (App.2346/02), Judgment of 26 April 2002.

⁶² *Pretty v the United Kingdom*, para 8.

⁶³ S.2(1) of the Suicide Act reads: A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to a term not exceeding fourteen years.

⁶⁴ Mrs Pretty submitted her arguments also under Article 2 (right to life), Article 3 (right to be free from inhuman and degrading treatment), Article 8 (right to private life), Article 9 (right to freedom of conscience and religion) and Article 14 (protection from discrimination). For the present purposes the discussion of the case is limited only to the notion of autonomy and the rights pertaining from that notion. Foremost this concerns Article 8, which is seen also by most of the commentators of the case as the primary provision Mrs Pretty could have had a chance to succeed in her claim. On the general analysis from the perspective of other Convention articles raised in this case see: D. Morris, "Assisted

make decisions about one's body and what happened to it. She maintained that she was a mentally competent adult, free from pressure and that she had made a fully informed and voluntary decision about whether, how, and when to die. Therefore she should not suffer under the consequences of the inflexibility of the law imposed on her.⁶⁵ Although the Court agreed that the evidence did not establish that she was vulnerable, nonetheless it ultimately found that since the states were entitled to use the criminal law to regulate activities that were detrimental to the lives and safety of others, the interference with Mrs Pretty's private life was justified as "necessary in a democratic society" (Article 8(2)). Section 2 of the 1961 Act was to safeguard life by protecting the weak and vulnerable, and it was the vulnerability of the class, which provided the rationale of the law in question.⁶⁶ To hold section 2 incompatible with the Convention would expose "the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life."⁶⁷

The conclusion of the Human Rights Court, that the prohibition of assisted suicide was not incompatible with any of the Convention articles raised, rendered the case unsuccessful for Mrs Pretty and unsatisfactory for those who saw it as the Court's failure to protect thereby her individual autonomy.⁶⁸ So far it seems that nothing had really changed compared to *Laskey*: the life and safety of other individuals prohibited in both of these cases certain individual acts. What made *Pretty* so special then?

The high precedential value of this particular Strasbourg ruling lies in two interconnected aspects: (a) in clear and explicit admission by the ECtHR that Mrs Pretty's Article 8 rights were engaged, and (b) in the particular articulation of the content of her rights.

Suicide under the European Convention on Human Rights: a Critique", (2003) *European Human Rights Law Review* 65-91; H.J.J. Leenen, note 15 above; A. Pedain, note 16 above.

⁶⁵ *Pretty v the United Kingdom*, para 72.

⁶⁶ *Pretty v the United Kingdom*, para 78.

⁶⁷ *Pretty v the United Kingdom*, para 74.

⁶⁸ See e.g. M. Freeman, "Denying Death its Dominion: Thoughts on the Dianne Pretty Case", (2002) 10 *Medical Law Review* 245-270; D. Morris, note 65 above; A. Pedain, note 16 above.

Already at the outset the Court added an important sentence to its otherwise standard definition of the “private life” to determine the applicability of Article 8 in this case. According to the Court

[t]he concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. *Although no previous case has established as such any right to self-determination as being contained in Article 8, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.* [Emphasis added]⁶⁹

The notion of personal autonomy is firmly recognised in this consideration, but there is more. The reference to Article 8 guarantees in general shows that personal autonomy is not only a component of the right to private life, but also a component of the three other rights mentioned in Article 8: the right to respect for family life, the right to one's home and the right to correspondence. What this arguably means is that in all of these contexts the respect of one's autonomy comes to play a central part. The way the Court interprets autonomy accordingly says a lot about what this respect demands from oneself and from the others in a wide spectre of circumstances concerning one's private life.

In determining whether Mrs Pretty's personal autonomy was affected in this case, the English courts' opinion was that Article 8 was directed to the protection of personal autonomy while the individual was alive but did not confer a parallel right to decide when and how to die.⁷⁰ In Lord Bingham's view “any attempt to base a right to die on Article 8 founders in exactly the same objection as an attempt based on Article 2, namely that the alleged right would extinguish the very benefit on which it is supposedly based.”⁷¹ The language of Article 2,⁷² as the House of Lords judges said,

⁶⁹ *Pretty v the United Kingdom*, para 61.

⁷⁰ *Pretty v Director of Public Prosecutions (Secretary of State for the Home Department Intervening)*, [2001] UKHL 61.

⁷¹ *Ibid.*, at 818.

reflected the sanctity of life, and therefore “it could be not interpreted as conferring a right to self-determination in relation to life and death and assistance in choosing death.”⁷³ This viewpoint expressed by the House of Lords resonates with the concept of autonomy discussed in the previous section – principled autonomy based on Kant’s philosophy – which demands acting after set standards of morality. This interpretation gives value to a general requirement for respect for the human person as a subject endowed with dignity and inalienable rights, and, to use Kant’s language, a subject who should be treated as an “end in itself.” As several commentators have pointed out, Kant himself would maintain that dignity of human beings renders suicide, assisted or not, morally impermissible.⁷⁴

If he destroys himself in order to escape from a difficult situation, then he is making use of his person merely as means so as to maintain a tolerable condition until the end of his life. However, a human is not a thing and hence is not something to be used merely as a means; one must in all one’s actions always be regarded as end in itself. Therefore, I cannot dispose of a human being in my own person by mutilating, damaging or killing him.⁷⁵

The Strasbourg Court took, however, a different turn and was “not prepared to exclude” the possibility that preventing Mrs Pretty from exercising her choice to avoid what she considered an undignified and distressing end to her life, constituted an interference with her right to respect for private life as guaranteed by Article 8.⁷⁶ There is no similar hesitation on the part of the Court as was present in *Laskey* about whether the acts under issue were representing such human “baseness” as to render Article 8 inapplicable. As an important note, the Court stressed that it is under Article 8 that notions of the quality of life take on significance:

The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of

⁷² Article 2(1) provides right to life: Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

⁷³ *Pretty v Director of Public Prosecutions (Secretary of State for the Home Department Intervening)*, at 800.

⁷⁴ J. Gentzler, “What is Death With Dignity?”, (2003) 28(4) *Journal of Medicine and Philosophy* 461-487, at 462; C. Foster, note 12 above, at 7; K. Veitch, note 51 above, at 63;

⁷⁵ Cited from J. Gentzler, note 74 above, at 462-463.

⁷⁶ *Pretty v the United Kingdom*, para 67.

life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an area of medical sophistication combined with longer life expectancies many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.⁷⁷

“Human dignity” and “sanctity of life” are present here, but “autonomy” is not linked to them. This reasoning indicates an acknowledgement that “the principle of personal autonomy in the sense of the right to make choices about one’s own body”,⁷⁸ applies to deciding on ending one’s life based on our own assessment of our quality of life. This suggests that autonomy as adopted in *Pretty* is based on a subjective (quality of life) valuation of life, rather than on some objective set of ideals (sanctity of life). Autonomy in this *individualistic* sense allows one to make a decision for any reason, rational or irrational, or no reason at all:

[t]he ability to conduct one’s life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be physically or morally harmful or dangerous for the individual concerned.⁷⁹

The precise nature of the activities required by the applicant to pursue her private life is arguably not a decisive factor for the applicability of Article 8(1), or the invocation of one’s autonomy rights in general. Interference with conduct, albeit private, of a life-threatening nature impinged on by the State’s compulsory or criminal measures could be, nevertheless, interference under Article 8(1), that required justification in terms of Article 8(2). In short, the scope of protection afforded to personal autonomy under the Convention included the making of autonomous choices even in matters of life and death.⁸⁰ The value of individual autonomy lies in the ability to choose and not in the consequences of the choice. Others should not interfere in the choices we make either in our “best interest” or to prevent harm to us, provided that we are deemed competent to make such choices.⁸¹

⁷⁷ *Pretty v the United Kingdom*, para 65.

⁷⁸ *Pretty v the United Kingdom*, para 66.

⁷⁹ *Pretty v the United Kingdom*, para 62.

⁸⁰ A. Pedain, note 16 above, at 181.

⁸¹ *Pretty v the United Kingdom*, para 72 and 73.

The concept of autonomy elaborated in this judgment by the ECtHR fits best with the term of individual autonomy as it is used in the literature to signify the freedom of the individual to act as they choose and to determine the shape of our own lives.⁸² In the words of Kim Atkins:

Autonomy, in the liberal tradition, is generally understood as self-determination: the freedom to pursue one's conception of the good life, just as long as it does not impinge upon another's identical freedom. On this view, each subject is best placed to judge what is good for him or her.⁸³

Since in the next chapter I will elaborate more closely on certain normative aspects of individual autonomy as presented in the ECtHR Article 8 case law, I will limit myself here with just some of the main elements of it to recap the idea of autonomy *Pretty* delivers:

- Importance is placed on the capacity of the chooser: the judgment particularly emphasises that Mrs Pretty was a mentally competent adult, free from pressure and who had made a fully informed and voluntary decision. Individual autonomy is posited as a feature of individuals in that it is taken to mean either independence from others or, at least, a capacity for independent decisions and action.⁸⁴
- As long as the chooser is competent, the content of the choice itself is irrelevant. This form of autonomy focuses on the procedural conditions of one's choices, *how* a decision is made rather than *what* is decided. As long as certain necessary conditions of the decision-making process are in place, the choice counts as autonomous, regardless of the value (or lack of value) of the object chosen.⁸⁵ To put it another way, this form of autonomy endorses what has been called

⁸² J. Harris, "Consent and End of Life Decisions", (2003) 29 *Journal of Medical Ethics* 10-15, at 10-11.

⁸³ K. Atkins, "Autonomy and the Subjective Character of Experience", (2000) 17(1) *Journal of Applied Philosophy* 71-79, at 74.

⁸⁴ O. O'Neill, note 12 above, at 28.

⁸⁵ P. Droegge, "Life as an Adjunct: Theorizing Autonomy from the Personal to the Political", (2008) 39(3) *Journal of Social Philosophy* 378-392, at 381.

subjective valuation of life's worth.⁸⁶ As such, the emphasis is on self-sovereignty, with little attention to the quality of choices that might result and their effect on others or the rights holder herself.

1.3. What informs the ECtHR? – The origins of the legal concept of individual autonomy

The discussion above argued that at least three different concepts of autonomy were available to the Human Rights Court to furnish the case law under its Article 8 jurisprudence. Out of those three concepts the Court chose individual autonomy. As I noted earlier this choice seemed self-evident and uncontroversial. But why? There must be something else other than the concept's philosophically idealistic appeal. I propose that there is a common assumption – equally among the judges as among the commentators – that the individual autonomy-based understanding of Article 8 rights exists on multiple justifications rooted in the principles and techniques that are either built into the Convention system or have been grafted on to it by the Convention system. Namely, as the supervisory organ of an international treaty, the Human Rights Court is guided by methods of interpretation the Court uses to furnish the broadly worded and open-textured Convention articles. Some of those rules are set by the 1969 Vienna Convention on the Law of Treaties; the others have emerged as “internal” principles through the Court's own case law. Through these methods of interpretation the Court does not only imbue meaning into the words and phrases of the Convention, but the methods also play a key role to render the judicial discretion and creativity the Court exercises in its decision-making legitimate.⁸⁷ In other words, these principles of interpretation delimit the Court's capacity to develop its own

⁸⁶ J.P. Safranek, “Autonomy and Assisted Suicide: The Execution of Freedom”, (1998) 28(4) *Hastings Center Report* 32-36, at 32.

⁸⁷ This is not to say that there does not exist a considerable amount of hostility and criticism towards judicial creativity on the part of the ECtHR calling its legitimacy or its “putative” activism into question. See e.g. P. Mahoney, “Marvellous Richness of Diversity or Invidious Cultural Relativism”, (1998) 19 *Human Rights Law Journal* 1-6; L.R. Helfer, “Consensus, Coherence and the European Convention on Human Rights”, (1993) 26 *Cornell International Law Journal* 133-165; D. Nicol, “Original Intent and the European Convention on Human Rights”, [2005] *Public Law* 152-172; See also J-P. Costa, “One the Legitimacy of the European Court of Human Rights' Judgments”, (2011) 7 *European Constitutional Law Review* 173-182.

approach of what law is at a specific point in time.⁸⁸ Hence, if individual autonomy is clearly and decisively resulting from the Court following its principles of interpretation, we have a weak case to propose anything different within the parameters of this institutional framework. But as this section argues nothing in the Convention system prescribes that individual autonomy is the only choice that can be, or should be, taken by the Court. Individual autonomy may seem the most obvious option to adopt, but this choice is hardly as straightforward as it seems.

In the context of the autonomy-related case law we can talk about three main sources and justifications for adopting individual autonomy as the underlying concept of Article 8 rights. These three sources are respectively interlinked with three methods of interpretation – dynamic interpretation, comparative interpretation and interpretation in light of the object and purpose of the Convention. Accordingly, first, following the dynamic interpretation, the concept of autonomy derives from changes in society. Second, following comparative interpretation, individual autonomy's animating force comes from certain domestic law developments. This includes taking into account the practice of domestic courts. Third, individual autonomy is derivative from the underlying object and purpose of the Convention. These principles of interpretation do not fall into a particular order or hierarchical system, but the Court sees the task of interpretation as a single complex exercise intended to ensure that the purpose and object of the Convention is fulfilled.⁸⁹ Therefore, although discussed here separately, these sources cannot be seen as isolated from each other, they are overlapping, complementary and reinforcing each other. I will review them now in turn.

1.3.1 The “living instrument” argument

Article 8 is known for its far-reaching scope and dynamic nature.⁹⁰ Over the years the Court has interpreted the right to private life in a progressive and evolutionary

⁸⁸ C. Rozakis, “The European Judge as Comparatist”, (2005) 80 *Tulane Law Review* 257-279, at 261.

⁸⁹ S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, CUP, 2006, at 196; C. Ovey, R.C.A. White, *Jacobs & White, The European Convention on Human Rights*, 4th ed, OUP, 2006, at 40.

⁹⁰ For a thorough overview of the case law the ECtHR has developed over the years, and how it has refined and expanded the meaning of Article 8, see P. Van Dijk, G.J.H. Van Hoof, *Theory and*

manner, extending the span of the right beyond its original privacy concern – threats to private space, especially to one’s home, and the right to have personal information kept secret. Thus, from very early in the history of the Convention, interferences with Article 8(1) were found in cases involving lawful searches of individuals’ homes⁹¹ and places of work,⁹² the “tapping” of private telephones,⁹³ the photographing of individuals,⁹⁴ and the collection⁹⁵ and retention and subsequent use of personal information.⁹⁶ In the meanwhile, Article 8 has been interpreted as applying in an ever-widening range of contexts, the Court bringing “more and more rights and possibilities within the ambit of Article 8”⁹⁷ – personal security, organisation of family life and relationships, sexual mores, and some business activities have been included under the protected interests of Article 8.⁹⁸ With the inclusion of the notion of personal autonomy that “is an important principle underlying the interpretation of its [Article 8] guarantees”⁹⁹, the influx of new rights under Article 8 case law has been especially active. In addition to admitting such arguably quite ambiguous rights as “a right to personal development”,¹⁰⁰ “right to self-determination”,¹⁰¹ “right to identity”¹⁰² and “right to autonomy”,¹⁰³ we can now identify a more concrete set of rights derived from case law. Among others, the Strasbourg Court has explicitly named the following: a right to respect for the decision to become a parent in a

Practice of the European Convention on Human Rights, 3rd ed, Martinus Nijhoff Publishers, 1998, Ch 7; C. Ovey, R.C.A. White, note 89 above, Ch 11; L.G. Loucaides, note 18 above, Ch 4; N.A. Moreham, “The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination”, (2008) 1 *European Human Rights Law Review* 44-79.

⁹¹ Case of *X v Federal Republic of Germany* (App.6794/74), Decision of 10 December 1975.

⁹² Case of *Niemietz v Germany* (App.13710/88), Judgment of 16 December 1992.

⁹³ Case of *Huvig v France* (App.11105/84), Judgment of 24 April 1990.

⁹⁴ Case of *Friedl v Austria* (App.15225/89), Judgment of 26 January 1995.

⁹⁵ Case of *X v Belgium* (App.9804/82), Decision of 7 December 1982.

⁹⁶ Case of *Leander v Sweden* (App.9248/81), Judgment of 26 March 1987.

⁹⁷ Case of *E.B. v France* (App.43546/02), Judgment of 22 January 2008, dissenting opinion of Judge Mularoni.

⁹⁸ On this generally, see D. Feldman, “The developing scope of Article 8 of the European Convention on Human Rights”, (1997) 3 *European Human Rights Law Review* 265-274.

⁹⁹ *Pretty v the United Kingdom*, para 61.

¹⁰⁰ *Van Kück v Germany*, para 69.

¹⁰¹ Case of *Daróczy v Hungary* (App.44378/05), Judgment of 1 July 2008, para 32.

¹⁰² *Reklos and Davourlis*, para 39.

¹⁰³ *Jehovah’s Witnesses of Moscow and Others v Russia*, para 134; *Kalacheva v Russia*, para 27; Case of *A, B and C v Ireland* (App.25579/05), Judgment of 16 December 2010, para 212.

genetic sense;¹⁰⁴ the right of a couple to conceive a child;¹⁰⁵ the right to choose the circumstances of becoming a parent;¹⁰⁶ a right to choice in matters of child delivery;¹⁰⁷ rights of the parents and children to be together in a family environment;¹⁰⁸ right to the protection of one's image;¹⁰⁹ the right to decide on the continuation of pregnancy;¹¹⁰ and the right to obtain available information on one's health condition.¹¹¹

The far-reaching scope of Article 8 and its jurisprudential developments are often explained by reference to one of the key interpretational methods of the Convention – that of dynamic or evolutive interpretation, adopted by the Court as early as 1978 in the case of *Tyrer v the United Kingdom*.¹¹² In this case the applicant had been subjected, when 16 years old, to judicial corporal punishment. Three strokes of the birch were administered to his bare posterior by a police officer for assaulting a fellow pupil. The basic issue for the Court was whether the birching amounted to “degrading treatment” contrary to Article 3 of the Convention. The Government of the Isle of Man, where the punishment had been imposed, argued that judicial corporal punishment was acceptable to the inhabitants of the island. However, the Court held that:

[t]he Convention is a living instrument which...must be interpreted in the light of the present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.¹¹³

Since the precedential case of *Tyrer*, the “living instrument doctrine” has enabled the Court to creatively update the interpretation of a number of Convention articles in varied situations. It has used it to justify a higher standard of protection, and to reduce the width of the margin of appreciation allowed to states by certain provisions

¹⁰⁴ *Evans v the United Kingdom*, para 72; *Dickson v the United Kingdom*.

¹⁰⁵ *S.H. and Others v Austria*, para 60.

¹⁰⁶ *Ternovszky v Hungary*, para 22.

¹⁰⁷ *Ternovszky v Hungary*, para 24.

¹⁰⁸ *Case of Kearns v France* (App.35991/04), Judgment of 10 January 2008, para 48.

¹⁰⁹ *Reklos and Davourlis*, para 38.

¹¹⁰ *R.R. v Poland*, para 188.

¹¹¹ *R.R. v Poland*, para 197.

¹¹² *Case of Tyrer v the United Kingdom*, (App.5856/72), Judgment of 24 April 1978.

¹¹³ *Tyrer v the United Kingdom*, para 31.

of the Convention.¹¹⁴ But, by reference to dynamic interpretation, it has also derived new rights from those expressly enshrined in the Convention. Besides the notoriously wide interpretation it has given to Article 8, it has used the “living instrument doctrine” also to adopt an extensive interpretation regarding the applicability of the right to a fair trial in Article 6(1),¹¹⁵ or the concept of “possessions” in Article 1 of the First Protocol.¹¹⁶

The commonly accepted rationale behind the evolutive interpretation is that for the Convention text from the mid-twentieth century to keep its relevance for today’s societies, it needs to adapt itself to changing social ideals and values. The very textual nature of the Convention requires positively that the articles are interpreted with wide latitude and creativity. As the former judge of the Court, Christos Rozakis, explains:

The very text of the Convention requires a specification of the concepts and notions contained therein, while the passing of time in a rapidly evolving world requires such specification in each instance to be given its current meaning, the one which is acceptable in European societies at the time of the application of a rule by the ECtHR./.../Hence, in order to keep abreast of new developments of societal habits and morals, the ECtHR is obliged to detect the mentalities that have emerged and to adapt the relevant concepts accordingly.¹¹⁷

What this means for Article 8 is that interests will be recognised and protected by the right to respect for private life as and when they are required by the civic life, its progressive social ideals and changing perceptions.¹¹⁸ Changes in social realities are

¹¹⁴ See generally on this A. Mowbray, “The Creativity of the European Court of Human Rights”, (2005) 5(1) *Human Rights Law Review* 57-79; J-P. Costa, note 87 above.

¹¹⁵ E. Brems, “Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms”, (2005) 27 *Human Rights Quarterly* 294-326, discussing the tensions with the judicial creation of sub-rights under Article 6 of the Convention.

¹¹⁶ S. Van Drooghenbroeck, “The Concept of “possessions” within the meaning of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, (2001) *The European Legal Forum* 437-496.

¹¹⁷ C.L. Rozakis, note 88 above, at 261. Another former judge of the Strasbourg Court, Loukis Loucaides, additionally affirms that the application of the “evolutive” canon “promises that new rights derived from the notion of ‘private life’ will continually be recognized whenever required by the conditions of social life.” See L.G. Loucaides, note 18 above, at 86.

¹¹⁸ D. Morris, note 64 above, at 76.

those that mandate, and perhaps demand even, the Court to reconsider or change its jurisprudence in particular situations to particular direction.

1.3.1.1 *Autonomy and social change*

This relationship between law and social change was clearly present in the *Pretty* judgment. The Human Rights Court emphasised the link between the right to make choices on one's quality of life and the development of medical technologies arguing that the increasing sophisticated body of medical knowledge, which allows longer life expectancy, should not mean that people are "forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity."¹¹⁹ The Court's recognition of the impact of the continual advancement of medical knowledge upon perceptions and experiences of death and the dying process is an acknowledgement that respect for autonomy comprises a social component regarding quality of life issues. As put by one of the case commentators, advances in medical technology, changes in social and cultural mores, increases in educational opportunities and people's income, and the high value attached to the individual autonomy in Western societies positively demand now that people have greater input into medical decision-making and control over life and death decisions.¹²⁰

Indeed, developments, which allowed autonomy and the autonomous individual to rise into prominence under the Convention system, may be seen in the consequence of diverse processes of social change.¹²¹ Medical developments are one aspect of it. They have helped in changing our view on life in respect of its duration and its quality. As Ulrich Beck has said: What is considered "health" and "disease" loses its pre-ordained "natural" character and becomes a quantity that can be produced in the

¹¹⁹ *Pretty v the United Kingdom*, para 65.

¹²⁰ H. Biggs, note 15 above, at 299; M. Freeman, "Death, Dying and the Human Rights Act", (1999) 52 *Current Legal Problems*, 218-238, at 227.

¹²¹ U. Beck, E. Beck-Gernsheim, *Individualization: Institutionalized Individualism and its Social and Political Consequences*, SAGE Publications, 2002; A. Honneth, "Organized Self-Realization: Some Paradoxes of Individualization, (2004) 7(4) *European Journal of Social Theory*, 463-478. See also Chapter 3.

work of medicine.¹²² Birth control, organ transplantation, genetic technology, among others, allow us to control decisions about the beginning and end of life. “Life” and “death” in this view are no longer permanent values and concepts beyond the reach of human beings. All this seems to facilitate a shift from the belief that the beginning and end of life is the domain of God to the idea that it is or at least can be the domain of human decision-making and autonomy.

Related to this are the process of secularisation and the decline of tradition, the falling off of religious and traditional beliefs and practices, emancipating the individual from set prescriptions about how to live his or her life. Following these developments, recent decades have, accordingly, seen remarkable changes in the domains of family life and reproduction, and evidenced profound shifts in the cultural meaning of gender and sexual relations. Again, these processes of secularisation and detraditionalisation have diversified the ways of life open to individuals and extended the space available for individual decision and choice, with law being the formal aspect, which enables the material manifestation of self-determination.¹²³

The important place that the social change factor holds in autonomy-related Article 8 case law can be further evidenced in two cases, decided just a couple of months after *Pretty*, concerning the claims of transsexual people who were unable to live in conformity with their chosen sex. The applicants of *Christine Goodwin v the United Kingdom*¹²⁴ and *I. v the United Kingdom*¹²⁵, both postoperative male to female transsexuals, claimed that the authorities’ had violated their right to private life (Article 8) and the right to marry (Article 12) in not legally recognising a postoperative transsexual as belonging to her new sex. In a “surprise turnabout”¹²⁶ the Court concurred with the applicants’ claims about their right to have their new identity recognised by law, emphasising its commitment to the importance of the notion of personal autonomy as an interpretative principle of Article 8:

¹²² U. Beck, *Risk Society: Towards a New Modernity*, SAGE Publications, 1992, at 210.

¹²³ B. De Vries, L. Francot, note 19 above, at 564.

¹²⁴ Case of *Christine Goodwin v the United Kingdom* (App.28957/95), Judgment of 11 July 2002.

¹²⁵ Case of *I. v the United Kingdom* (App.25680/94), Judgment of 11 July 2002.

¹²⁶ B. Rudolf, note 23 above, at 716.

Under Article 8 of the Convention, where the notion of personal autonomy is an important principle, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.¹²⁷

Arguably underlying this particular consideration to the right to personal autonomy,¹²⁸ the Court turned away from its previously established case law concerning postoperative transsexuals,¹²⁹ according to which the respondent government's margin of appreciation extended to legal recognition of people who had chosen to have their sex changed. Having regard to the "changing conditions" and the need to interpret the Convention "in the light of present-day conditions"¹³⁰, the Court in *Goodwin* and *I.* no longer found that the scientific community's continuing debate about the exact nature of transsexualism, the absence of common European approach to resolving questions relating to transsexuals or the wider impact of making changes to the birth register, were decisive factors in determining the case. But what were the changed social conditions that put the individual's right to establish details of her identity at the very centre of this debate?

First, there was the argument about medical developments. While it remained the case that a transsexual cannot acquire all the biological characteristics of the assigned sex, the Court noted that "with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element."¹³¹ Since chromosomal anomalies may arise also naturally, the Court did not, however, consider it significant enough for the purposes of legal attribution of gender identity. Additionally it was noted that gender re-assignment surgery was also lawfully provided by the NHS services, which recognised the condition of gender dysphoria.¹³² What is important about the Court's discussion about medical developments is the latter's capacity to open up space for

¹²⁷ *Christine Goodwin v the United Kingdom*, para 90; *I. v the United Kingdom*, para 70.

¹²⁸ B. Rudolf, note 23 above, at 721; See A. Campbell, H. Lardy, note 18 above, at 210; P. Johnson, note 50 above, at 68.

¹²⁹ See Case of *Rees v the United Kingdom* (App.9532/81), Judgment of 17 October 1986; Case of *Cossey v the United Kingdom* (App.10843/84), Judgment of 27 September 1990; Case of *X. Y. and Z. v the United Kingdom* (App.21830/84), Judgment of 27 September 1990; Case of *Sheffield and Horsham v the United Kingdom* (App.22985/93; 23 390/94), Judgment of 30 July 1998.

¹³⁰ *Christine Goodwin v the United Kingdom*, para 74 and 75.

¹³¹ *Christine Goodwin v the United Kingdom*, para 82.

¹³² *Christine Goodwin v the United Kingdom*, para 78.

personal autonomy and decision-making in matters pertaining to one's gender. Something that was determined by strict biological facts has been opened up for choice, even if that choice is restricted by "numerous and painful interventions involved in such surgery."¹³³

Next, the Court gave importance to the increased social acceptance of transsexuals, evidenced *inter alia*, by the growing legal recognition of the new sexual identity of postoperative transsexuals in other jurisdictions.¹³⁴ Again, this indicates social trends towards recognition that perhaps there does not exist a straightforward line between whether one was created to be a man or a woman, but that there may be different and competing criteria for designating an individual as male or female.¹³⁵ Increasingly one's sexuality or gender can be perceived not, predominately, as a matter of biological fact, but as a matter of personal choice.

We have seen now that social and scientific developments have played an important part in bringing autonomy to the fore – the liberation of the individual from traditional ties coupled with scientific progress, opens up the space for the increased freedom of choice and individual creativity. Besides developments in medicine and change in social attitudes towards e.g. gender and sexuality, there is more. Increased educational options, growth in people's income, increasing cultural ideals about being independent and being in control of one's life – there is a variety of social factors that have arguably similarly contributed to the infiltration of the ideas of individual autonomy into the Convention system. I will address some of these aspects more thoroughly in Chapter 3. The point to be made here is that individual autonomy's ascendancy in human rights law in this sense is part of the spirit of the age. The influx of autonomy rights and the individualistic interpretation given to them at the same time contributes and conforms to the idea or ideology of the pursuit of self-sufficiency as the organising principle of Western postmodern societies. Since society values individual autonomy it has become an interest that is subject to

¹³³ *Christine Goodwin v the United Kingdom*, para 81 of the judgment. For an interesting account on whether governments need to control and collect information about a person's sex or gender identity see L. Shrage, "Does the Government Need to Know Your Sex?", (2012) 20(2) *The Journal of Political Philosophy* 225-247.

¹³⁴ *Christine Goodwin v the United Kingdom*, para 85.

¹³⁵ L. Shrage, note 133 above, at 236.

protection under the Convention system. This much might seem obvious, however, as the following argument shows, it is an impoverished position.

Although I think the Court is right to “take into account contemporary realities and attitudes not the situation prevailing at the time of the drafting of the Convention in 1949-1950,”¹³⁶ and thereby acknowledge the importance of autonomy in contemporary Western societies, it cannot just assume the characteristics of society. The Court needs to be sensitive to the new challenges of individualised societies, and when needed, act as a corrective of the “natural” order.¹³⁷

Drawing from the works of sociologists, Chapter 3 demonstrates that there are several misconceptions about the idea and ideal of the free and autonomous individual, which assumes that individuals alone can master the whole of their lives. The individual of the 21st century is not a “monad, but is self-*insufficient* and increasingly tied to others.”¹³⁸ The prevailing liberal model of the autonomous self the Court adheres to not only misrepresents what is happening in the society, but crucially contributes to the ideal of independence and self-realisation at the cost of social alienation, growing insecurity and distrust towards others.

1.3.2 The ECHR: a system in constant dialogue

The adoption of the concept of individual autonomy in the examination of Article 8 claims can be further understood if it is put in the broader picture of materials that are not part of the Convention, but which can be used in the exploration of its values and evolving material scope. This “dialogue” between the ECtHR and other bodies has become a technique common in recent years.¹³⁹ The Court increasingly takes note of non-Convention materials in cases that involve controversial social and political issues, or when it seeks support to reverse its past case law. The Convention system, as Judge Rozakis suggests in this context, is “in constant dialogue with other

¹³⁶ P. Van Dijk, G.J.H. Van Hoof, note 90 above, at 77-78.

¹³⁷ See C. Douzinas, *Human Rights and Empire*, Routledge-Cavendish, 2007, at 126.

¹³⁸ U. Beck, E. Beck-Gersnheim, note 121 above, at xii.

¹³⁹ See also V. Mantouvalou, “Is There a Human Rights Not to Be a Trade Union Member? Labour Rights Under the European Convention on Human Rights”, LSE Law, Society and Economy Working Papers 08/2007, available at www.lse.ac.uk/collections/law/wps/wps.htm

legal systems,”¹⁴⁰ taking into consideration the decisions of other “brother” courts, or influential domestic courts ranking high in the conscience of the legal world. This method of interpretation is driven, on the one hand, by the aim of the ECtHR as an international body to protect, provide for and integrate human rights in Europe. On the other hand, the approach aims to enrich the protection of human rights with principles and values that presumably have acquired universal dimensions.¹⁴¹

The dialogue of the ECtHR with other legal orders can be seen to have affected the development of Article 8 autonomy-based case law in two main forms. First, through the process of detecting the domestic legal parameters of a case before it, the inspirational source for adopting individual autonomy has been the Respondent State’s practice. In this case, arguably, the most influential has been the way English courts have interpreted autonomy. This can be ascribed, at least partially, due to the fact that one of the most influential early autonomy-related case laws originated from the United Kingdom.¹⁴² The second source of inspiration seems to derive from the dialogue with the international legal order – courts operating in domestic legal orders outside Europe. In this case we can talk primarily about the dialogue with the courts of the United States of America and with the Canadian Supreme Court.

One more instance of dialogue serves to be mentioned here – dialogue with domestic legal systems of States party to the Convention, to which the ECtHR resorts in order to decipher the state of law prevailing at a particular moment on the European continent concerning the matter before the Court. However, in terms of choosing the way to interpret autonomy, it has played a rather modest part. The Court uses this form of dialogue to decipher whether there exists some kind of a consensus in European countries about certain aspects of the matter, without going into detail how one or another country has actually interpreted autonomy.

In the following I will give a very brief overview of the North-American and English law on autonomy corresponding to that of the scope of Article 8. Thereafter, I will consider some of the most authoritative autonomy-related cases of the ECtHR, and

¹⁴⁰ C.L. Rozakis, note 88 above, at 268.

¹⁴¹ Ibid., at 257.

¹⁴² E.g. *Pretty v the United Kingdom*; *Christine Goodwin v the United Kingdom*; *Evans v the United Kingdom*.

argue that it is the impact of Anglo-American law on autonomy that has most decisively shaped the Court's choices and preferences on furnishing autonomy under its Article 8 case law.¹⁴³ The close resemblance to what has already for decades been taking place in common law countries has prompted some of the commentators even to note on the *Pretty* case accordingly: "The novelty about the case was its form, the legal battles fought by Mrs Pretty were not entirely new."¹⁴⁴

1.3.2.1 *Autonomy in the domestic arena*

Autonomy might be a late addition under the Convention system and in the practice of the Strasbourg Court, but the concept has figured in the judgments of domestic courts for a while now. It is precisely because of the high value attached to the individual's autonomy that privacy rights started to expand in the 1960-70s in North American courtrooms.¹⁴⁵ After its debut in cases on contraception and abortion,¹⁴⁶ "the new privacy jurisprudence" developed around matters of reproductive rights, sexuality and intimate personal relationships.¹⁴⁷ The new constitutional privacy analysis in the United States articulated the concept of a right to personal privacy as an individual right to decisional autonomy (to pursue one's conception of the good), control over access to personal information, and a new conception of the scope of individual privacy that now applies to aspects of the domain of morals (including health and safety) that were formerly the special preserve of state regulation.¹⁴⁸ The concern of the new privacy rights was on the freedom of the individual, not the particular quality of the choice resulting from that freedom, nor the well-being of the right holder. As Eberle says: "As alone individuals, Americans are then free to choose the values with which to constitute themselves and govern. And these values

¹⁴³ On the dialogue between English courts and the ECtHR generally see M. Amos, "The Dialogue Between United Kingdom Courts and the European Court of Human Rights", (2012) 61(3) *International and Comparative Law Quarterly* 557-584.

¹⁴⁴ H. Biggs, note 15 above, at 297.

¹⁴⁵ E.J. Eberle, *Dignity and Liberty. Constitutional Visions in Germany and the United States*. Praeger, 2002; J.L. Cohen, note 54 above.

¹⁴⁶ On contraception *Griswold v Connecticut*, 381 U.S. 479 (1965); on abortion *Roe v Wade*, 410 U.S. 113 (1973).

¹⁴⁷ J.L. Cohen, note 54 above, at 6.

¹⁴⁸ *Ibid.*

become central to personal dignity and autonomy.”¹⁴⁹ In America, personal autonomy is essentially the right to choose.

Similar developments took place across the ocean in the United Kingdom, in the English legal arena. In one of the most authoritative English medical law cases, *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital and Others*,¹⁵⁰ the appellant became severely disabled as a result of the operation that was meant to relieve persistent pain in her neck, right shoulder and arms. Mrs Sidaway sued in negligence, alleging that the surgeon had failed to disclose to her the aforementioned risks. In order to establish whether there had been a breach of the surgeon’s duty of care to his patient, Lord Scarman was of the opinion that one could not simply refer to “the current state of responsible and competent professional opinion and practice at the time.”¹⁵¹ Rather, “the right to self-determination” – “a basic human right protected by the common law” – entailed a duty for a doctor to warn the patient of the material risks inherent in the treatment proposed so that the patient could make up her own mind in light of the relevant information.¹⁵²

A similar example of the interpretation of autonomy can be found in a statement of Lord Donaldson in *Re T (Adult: Refusal of Medical Treatment)*:¹⁵³

The patient’s interest consists of his right to self-determination – his right to live his own life how he wishes, even if it will damage his health or lead to his premature death....It is well established that in the ultimate the right of the individual is paramount.¹⁵⁴

What we can see in Lord Scarman’s and Lord Donaldson’s opinion is a reiteration of some of the familiar aspects of what is commonly understood by individual autonomy: self-determination; living one’s own life in accordance with one’s values; individual’s control over the information pertaining to her treatment. Subsequent judicial developments have proceeded in the same vein. If anything, individual

¹⁴⁹ E.J. Eberle, note 145 above, at 151.

¹⁵⁰ *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital and Others* [1985] 2 WLR 480.

¹⁵¹ *Ibid.*, at 483.

¹⁵² *Ibid.*

¹⁵³ *Re T (Adult: Refusal of Medical Treatment)* [1992] 4 All ER 649.

¹⁵⁴ *Ibid.*, at 661.

autonomy's importance has been growing in common law jurisdictions. Kenneth Veitch has put it accordingly: "It is the atomistic, right-bearing individual that has dominated both the academic medical literature and, at least ideologically the [English] courts over the last quarter century or so."¹⁵⁵

1.3.2.2 *Autonomy and the comparative method*

Several autonomy-related ECtHR cases illustrate the point how this developing case law is influenced by the reasoning already adopted by the above-discussed domestic courts. *Pretty*, again, provides a good starting point.

First, in a rather unusual way, the Court gave an extensive reproduction of Lord Bingham's opinion in the House of Lords decision.¹⁵⁶ Although, as discussed above, the Court departed in one crucial aspect from the House of Lords decision,¹⁵⁷ the latter's language still manages to impact the way the Court frames autonomy:

[t]he imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8(1) of the Convention. As recognised in domestic case law, a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life.¹⁵⁸

An important legal implant here to be noted is that of the legal doctrine of consent. In the following autonomy-related case law it occurs as one of the central elements to guarantee the protection of one's autonomy.

Next, in support of its argument that Mrs Pretty's Article 8 rights were engaged, the Human Rights Court seems to have been inspired by a decision of the Canadian Supreme Court, *Rodriguez v the Attorney General of Canada*,¹⁵⁹ where "comparable concerns arose regarding the principle of personal autonomy in the sense of the right

¹⁵⁵ K. Veitch, note 51 above, at 62; See also C. Foster, note 12 above, at 6.

¹⁵⁶ *Regina (Pretty) v Director of Public Prosecutions* (Secretary of the State from the Home Department intervening), [2001] UKHL 61.

¹⁵⁷ One has to keep in mind that we are talking about "dialogue" that takes place between the Human Rights Court and the domestic courts, not that of monologue, or one-sided influence enforced by one party unto another.

¹⁵⁸ *Pretty v the United Kingdom*, para 63.

¹⁵⁹ *Case of Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

to make choices about one's own body.”¹⁶⁰ Like Mrs Pretty, Ms Rodriguez had been diagnosed with an incurable progressive disease affecting her nervous system. In order to avoid the stress and loss of dignity caused by the prospect of a painful death, Ms Rodriguez wanted her doctors to help her end her life at the time of her choosing. Since aiding or abetting suicide was contrary to Section 241(b) of the Criminal Code, she applied for an order to declare the provision invalid on the grounds that it contravened Section 7 of the Canadian Charter of Rights and Freedoms.¹⁶¹ The Canadian Supreme Court was not unanimous to hold that the Criminal Code's provisions withstood the constitutional challenge. For the dissenting minority the law drew an arbitrary distinction between suicide (which was decriminalised) and assisted suicide, thus denying a choice to some that was available to others.¹⁶² What both, the majority and minority agreed to, was that Section 241(b) infringes Mrs Rodriguez's right to liberty and security of the person as articulated in Section 7 of the Canadian Charter of Rights and Freedoms. Despite Article 8 containing no separate reference to personal liberty or security, arguably the decisive connecting link between these cases was their mutual concern with the underlying value of personal autonomy.¹⁶³ Later, the Court relied, *inter alia*, on this Canadian case also to find support for its conclusion that States have the right to control through their criminal laws activities prejudicing the life and security of a third person.¹⁶⁴

In *Evans v the United Kingdom*,¹⁶⁵ – another authoritative case among the ECtHR Article 8 autonomy-based case law – concerning the applicant's right to respect for

¹⁶⁰ *Pretty v the United Kingdom*, para 66.

¹⁶¹ According to Section 7 of the Canadian Charter of Rights and Freedoms everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

¹⁶² See the judicial opinion per McLachlin J.

¹⁶³ See the judicial opinion *per* La Forest, Sopinka, Gonthier, Iacobucci and Major JJ: Security of the person in s. 7 [of Canadian Charter] encompasses notions of personal autonomy (at least with respect to the right to make choices concerning one's own body), control over one's physical and psychological integrity which is free from state interference, and basic human dignity.

¹⁶⁴ *Pretty v the United Kingdom*, para 74. Applicants resorting to the Human Rights Court with their right to die pleas might find now, however, new “hope” by the recent case of the Supreme Court of British Columbia, *Carter v Canada (Attorney General)*, [2012] BCSC 886, where Justice Lynn Smith declared with the very comprehensive, 359-page ruling, Canadian Criminal Code provisions against physician-assisted suicide unconstitutional because they discriminate against physically disabled people.

¹⁶⁵ *Evans v the United Kingdom*.

the decision to become a parent in a genetic sense, the ECtHR followed the path similar to *Pretty*. The Court gave an extensive overview of the domestic proceedings of the case. This included citations of the High Court Judge, as well as the reprint of extracts from the Court of Appeal's judgment. In addition to that, the *Evans* judgment included the domestic discussion concerning the regulation of the medically assisted reproduction preceding the adoption of the relevant legislature. All these instances emphasised the primacy of consent of both parties participating in assisted reproduction. Underlying the importance of consent was the consideration that it was necessary to uphold the principle of self-determination or personal autonomy – “the each person's right to be protected against the interference with their private life.”¹⁶⁶ In a large part the Human Rights Court was, in its own decision, replicating the language of the English authorities.

As to the dialogue with foreign jurisdictions outside Europe, several cases from the United States courts' practice and an Israeli Supreme Court case concerning medically assisted reproduction were brought out for comparison.¹⁶⁷ However, only the Israeli Supreme Court decision in *Nachmani v Nachmani*¹⁶⁸ was mentioned in the Court's own reasoning to highlight the difficulties of balancing the equal (autonomy) rights of the parties to assisted reproduction.

We also see in several more recent cases how the terminology of consent, control and self-determination has become inseparable for the interpretation of autonomy. So in *Jehovah's Witnesses of Moscow v Russia*¹⁶⁹ the Court explained the essence of the autonomy in the sphere of medical assistance in the following way:

The freedom to accept or refuse specific medical treatment or to select an alternative form of treatment, is vital to the principles of self-determination and personal autonomy... [F]or this freedom to be meaningful, patients must have the right to make choices that accord with their own views and values, regardless of how irrational, unwise or imprudent such choices may appear to others....[a]lthough the public interest in preserving the life or health of a patient was undoubtedly legitimate and very strong, it had to yield to the patient's stronger interest

¹⁶⁶ *Evans v the United Kingdom*, para 26, citing Lady Justice Arden.

¹⁶⁷ *Evans v the United Kingdom*, para 43-48.

¹⁶⁸ *Nachmani v. Nachmani*, 50(4) P.D. 661 Isr.

¹⁶⁹ *Jehovah's Witnesses of Moscow v Russia*.

in directing the course of his or her own life....[f]ree choice and self-determination were themselves fundamental constituents of life and that, absent any indication of the need to protect third parties – for example, mandatory vaccination during an epidemic, the State must abstain from interfering with the individual freedom of choice in the sphere of health care, for such interference can only lessen and not enhance the value of life.¹⁷⁰

In *Reklos and Davourlis v Greece*,¹⁷¹ the effective protection of a person's image entailed obtaining the consent of the person concerned, or the latter would have no control over any subsequent use of the image.¹⁷² In *Ternovszky v Hungary*¹⁷³ the applicant's right to personal autonomy entailed the existence of legal and institutional environment that enabled the mother to form an (informed) choice as to the circumstances of giving birth.¹⁷⁴

I do not challenge the importance of the comparative method of interpretation to the development of the ECtHR case law – this kind of communication of knowledge is material in an increasingly globalised world, where human activities are not curtailed any more by national boundaries. Nevertheless, in the context of the ECtHR new autonomy-based case law, it seems that the “dialogue” between the Court and the “foreign” institutions has been sometimes rather one-sided. The preferences and choices made in the English and North American courtrooms have been seemingly indiscriminately transplanted into the Human Rights Court's “autonomy” language. In determining the content of the concept of autonomy, the Court has neglected its usual critical manner to make interpretative choices out of respect for what the Convention grants,¹⁷⁵ and it has relied instead on the domestic characterisation of the notion of autonomy.

In this way the Court seems to ignore what a highly contested issue the concept of autonomy is at the moment in American constitutional law as well as in its primary field of application – in medical law and bioethics. Individual autonomy has recently

¹⁷⁰ *Jehovah's Witnesses of Moscow v Russia*, para 136.

¹⁷¹ *Reklos and Davourlis v Greece*.

¹⁷² *Reklos and Davourlis v Greece*, para 40.

¹⁷³ *Ternovszky v Hungary*.

¹⁷⁴ *Ternovszky v Hungary*, para 22 and 24.

¹⁷⁵ G. Letsas, “The Truth in Autonomous Concepts: How to Interpret the ECHR”, (2004) 15(2) *European Journal of International Law* 279-305.

come under attack from a variety of perspectives, particularly from feminist and communitarian sides.¹⁷⁶ Some scholars speak even of the tyranny of autonomy in medical ethics and law.¹⁷⁷ Others have argued that the informed consent requirements are ethically inadequate means for protecting autonomy.¹⁷⁸ All in all, more and more voices express doubt about whether individual autonomy is in fact an appropriate model for life. While there has been detected some signs that American law on autonomy is moving away from the view of individuals as mere lone rangers and toward a conception of persons who may exercise rights in ways that connect to community,¹⁷⁹ the ECtHR case law has allegedly “even leapfrogged the homeland country of individual freedoms on the road towards individual autonomy, free choice and privacy rights.”¹⁸⁰

In the next chapter I will address more concretely the potential shortcomings of this legal transplantation to matters pertaining to interpersonal relationships and to one’s personal life. There are difficulties and consequences of importing autonomy as it is used in domestic medical law cases into human rights law, where sometimes excessive weight is placed on quite minimal and even implausible conceptions of individual autonomy.

1.3.3 Back to the future

The final general perception concerning individual autonomy I want to address in this chapter, supported by the case law and its commentators, is the understanding that there is nothing “new” about the alliance between autonomy and Article 8, or autonomy and the Human Rights Convention in general. In *R.R. v Poland*,¹⁸¹ for instance, the Court stated that it had already been established in *Bruggeman and*

¹⁷⁶ See e.g. M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, The Free Press, 1991; M.J. Sandel, *Liberalism and the Limits of Justice*, 2nd ed, CUP, 1998; J.L. Cohen, note 54 above; D. Callahan, “Autonomy: A Moral Good, Not a Moral Obsession”, (1999) 26(1) *Journal Of Law and Society* 6-26.

¹⁷⁷ C. Foster, note 12 above.

¹⁷⁸ N.C. Manson, O. O’Neill, *Rethinking Informed Consent*, CUP, 2007.

¹⁷⁹ E.J. Eberle, note 145 above, at 151. See also *Washington v Glucksberg*, 521 U.S. 702 (1997).

¹⁸⁰ M. Cartabia, note 20 above, at 26.

¹⁸¹ *R.R. v Poland*.

*Scheuten v Germany*¹⁸² – an abortion case decided in 1977 – that the choice of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and as a matter of autonomy.¹⁸³ Commentators have, equally, found no difficulty in discerning traces of autonomy in earlier case law, seeing it as part of the Court’s long-established role under Article 8 to promote and protect the free development of individual personality.¹⁸⁴ Trends towards the increasing importance of personal autonomy have been detected in “pre-*Pretty*” cases concerning the rights of sexual minorities, victims of sexual violence, rights of prisoners, etc.¹⁸⁵

This position is further endorsed by the relatively disorganised use of the language of autonomy in the case law of the Human Rights Court, where autonomy has been collaterally, albeit for somewhat dubious reasons, referred to as a “principle underlying the interpretation of Article 8 guarantees”,¹⁸⁶ as a distinct “right to personal autonomy”¹⁸⁷, and finally, as a “sphere of personal autonomy within which everyone can freely pursue the development and fulfilment of his or her personality and to establish and develop relationships with other persons and the outside world.”¹⁸⁸ In addition to that, often the case law now combines autonomy with notions already long in use in the Court’s practice, such as the protection of one’s identity and integrity. Yet again, one is left with no real guidance about whether the principle of autonomy has always been the basis for the protection of identity and

¹⁸² Case of *Bruggeman and Scheuten v Germany* (App.6959/75), Commission’s Report of 12 July 1977.

¹⁸³ *R.R. v Poland*, para 181.

¹⁸⁴ D. Morris, note 64 above, at 77. Morris refers back to case of *X v Iceland* (App.6825/74), Commission’s Report of 18 May 1976, a case involving a challenge to a law, which prohibited the keeping of dogs except in limited circumstances; and case of *Botta v Italy* (App.21439/93), Judgment of 24 February 1998. The applicant of this case, a physically disabled man, asserted that Italy’s failure to take appropriate measures to remedy the omissions imputable to the private bathing establishments – lack of lavatories and ramps providing access to the sea for the use of disabled people – deprived him of social life and was contrary to the right to private life under Article 8. It should be noted that in both of these cases the Court declared the applications inadmissible. See also N. Priaulx, “Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters”, (2008) 16 *Medical Law Review* 169-200; N.A. Moreham, note 90 above; H.T. Gomes-Arostegui, “Defining private life under the European Convention on Human Rights by referring to reasonable expectations”, (2005) 35(2) *California Western International Law Journal* 153-202.

¹⁸⁵ J. Marshall, “Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate”, (2008) 30 *Human Rights Quarterly* 631-654, at 641-642.

¹⁸⁶ *Pretty v the United Kingdom*, para 61.

¹⁸⁷ *Evans v the United Kingdom*, para 71.

¹⁸⁸ *Jehovah’s Witnesses of Moscow and Others v Russia*, para 117.

integrity rights,¹⁸⁹ or if the right to personal autonomy is in fact a special right, a derivative or an extension of these “older” notions.¹⁹⁰ Be that as it may, mixing autonomy with concepts of identity and integrity only magnifies the impression that autonomy is and always has been part of the Convention system, even if not explicitly expressed in the written text of the Convention.

1.3.3.1 The object and purpose of the Convention: A libertarian bill of rights?

The roots for the understanding that regards individual autonomy and the Convention as being closely and consistently connected could be found in the idea that any interpretation of the Convention rights need to be seen in the light of the object and purpose of the Convention itself. The Preamble to the Convention is to be considered here as one of the most important sources of inspiration. Already in *Golder v the United Kingdom*¹⁹¹ the Court recognised the Preamble as part of the context of the substantive text and indicative of its object and purpose.¹⁹²

As noted earlier, the Convention does not mention “autonomy.” The Preamble does, however, make a reference to the Universal Declaration of Human Rights. According to Article 1 of the Declaration all human beings are born free and equal in dignity and rights. Relying on this reference, scholars have argued that the ECHR “expresses an unwavering commitment to the principle of respect for human dignity”¹⁹³ and human dignity is understood as embracing within it respect for individual autonomy. Respect for individual autonomy and human dignity in this sense are considered “sufficiently close to be linked together under this [human dignity] principle rather than allocated their own separate ethical spaces.”¹⁹⁴

¹⁸⁹ *Ciubotarou v Moldova*, para 49.

¹⁹⁰ *Ternovszky v Hungary*, para 22.

¹⁹¹ *Case of Golder v the United Kingdom* (App.4451/70), Judgment of 21 February 1975.

¹⁹² *Golder v the United Kingdom*, para 34.

¹⁹³ C. Gearty, *Principles of Human Rights Adjudication*, OUP, 2004, at 84.

¹⁹⁴ C. Gearty, note 193 above, at 84; See also L.G. Loucaides, note 18 above, at 85; C. Ovey, R.C.A. White, note 89 above, at 1; J. Marshall, note 17 above, at 338; C.A. Gearty, “The European Court of Human Rights and the Protection of Civil Liberties: An Overview”, (1993) 52 *Cambridge Law Journal* 89-127, at 93.

In Strasbourg this association between dignity and individual autonomy first occurred in the language of dissenting judges. In 1990 Judge Martens, in his dissenting opinion on the *Cossey* judgment¹⁹⁵ about the legal recognition of the rights of transsexuals, considered respect for human dignity and human freedom to be “the principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention.”¹⁹⁶ Human dignity and human freedom meant for Judge Martens that “a man should be free to shape himself and his fate in the way that he deems best fits his personality.”¹⁹⁷ Judge Martens defended this position further in his partially dissenting opinion in *Kokkinakis v Greece*,¹⁹⁸ where the Human Rights Court upheld the conviction of a Jehovah’s Witness for proselytising in violation of Greek criminal law. He explained the content of these underlying principles of the Convention in the following way:

[S]ince respect for human dignity and human freedom implies that the State is bound to accept that in principle everybody is capable of determining his fate in the way that he deems best – there is no justification for the State to use its power to “protect” the proselytised. ...[E]ven the “public order” argument cannot justify use of coercive State power in the field where tolerance demands that “free argument and debate” should be decisive.¹⁹⁹

In Judge Martens’ view, the object and purpose of the Convention required respect for an individual’s capacity to make choices about intimate matters without interference by the State and also without the State’s protection from undue influence. The fundamental object of human rights relates to respect for the individual as a free and independent agent, able to make autonomous choices. A similar position was endorsed in the dissenting opinion of Judge Van Dijk in *Sheffield and Horsham v the United Kingdom*,²⁰⁰ where he refers to the “fundamental right to self-determination” – “not separately and included in the Convention, but... at the basis of several of the rights laid down therein” – and “a vital element of the

¹⁹⁵ *Cossey v the United Kingdom*.

¹⁹⁶ *Cossey v the United Kingdom*, Dissenting opinion of Judge Martens, para 2.7.

¹⁹⁷ *Ibid.*

¹⁹⁸ Case of *Kokkinakis v Greece* (App.14307/88), Judgment of 25 May 1993.

¹⁹⁹ *Kokkinakis v Greece*, Partly dissenting opinion of Judge Martens, para 15.

²⁰⁰ Case of *Sheffield and Horsham v United Kingdom*, (Apps.22985/93;23390/94), Judgment of 30 July 1998.

“inherent dignity”, which according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.”²⁰¹

Whereas the Court has never in so many words explained the association between human dignity, human freedom and individual autonomy, it has on several occasions now explicitly acknowledged that the “very essence of the Convention is respect for human dignity and human freedom.”²⁰² As noted earlier, this statement took an important place in the *Pretty* judgment, and it has been used now in several other more recent autonomy-related cases,²⁰³ prompting a shared opinion that the role of human dignity and human freedom is to further individual autonomy, in the sense of advancing individual liberty based upon the choice of the individual.²⁰⁴ On this reading, the function of human dignity and human freedom is to reinforce claims to self-determination rather than to limit free choice; it is a conception of individual empowerment rather than of social or collective constraint.²⁰⁵

From this viewpoint autonomy comes as close as possible to reflect the liberal paradigm of individual and individual rights.²⁰⁶ Within liberal political theory, autonomy is considered to be an individual right and this rationalism provides the core assumption about the relationship with the state. Liberalism, in this context, depends on the ability of an autonomous individual to make rational decisions about her own life and government should interfere as little as possible in the lives of its citizens.²⁰⁷ It is worked out in a myriad of civil-political rights, which have been laid down in international treaties and in national documents, such as bills of rights,

²⁰¹ *Sheffield and Horsham v United Kingdom*, Dissenting opinion of Judge Van Dijk, para 5.

²⁰² For the first time it was said in the case of *C.R v the United Kingdom* (App.20190/92), Judgment of 27 September 1995, para 42, concerning immunity for prosecution for marital rape.

²⁰³ *Christine Goodwin v the United Kingdom*, para 90; *I. v the United Kingdom*, para 70.

²⁰⁴ C. McCrudden, “Human Dignity and Judicial Interpretation of Human Rights, (2008) 19 *European Journal of Human Rights* 655-724, at 699; B. Rudolf, note 23 above, at 719; A. Campbell, H. Lardy, note 18 above.

²⁰⁵ D. Beyleveld, R. Brownsword, *Human Dignity in Bioethics and Biolaw*, OUP, 2001, at 28.

²⁰⁶ D. Feldman, “Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty” (1994) 47(2) *Current Legal Problems* 41-71, at 54, Feldman describes “autonomy” as “central to liberal theory.” See also S. Wheatley, note 18 above, at 314.

²⁰⁷ Needless to say that this is not the only possible meaning or strand of liberalism. “Communitarian” liberals, such as Will Kymlicka and Joseph Raz, say they pay attention to individuals as members of groups; social democracy belongs to the liberal tradition and does not advocate a hands-off approach by the government.

constitutions and ordinary legislation. All of these instruments have emphasised the importance of individual self-determination and the limited role of the state which stays away from interference with the private sphere of the individual or, if necessary, demands action from the state to guarantee the exercise of self-determination. Furthermore, the protection of self-determination is perceived as the global legal-normative core of our society. Costas Douzinas has put it in this way: “A key claim of liberalism is that it does not impose a conception of the good life, but allows people to develop and carry out their own life-plans, through the use of rights.”²⁰⁸ The purpose of ECHR as any other human rights treaties is, therefore, seen to protect the autonomy of individuals against the majoritarian will of their state.²⁰⁹

Given the intimate connection between this kind of liberalism, autonomy and rights,²¹⁰ it is natural that one might wish to ask: is this not the issue then that the Court has been concerned with all along – maybe not expressed as autonomy, but certainly enumerated as “individual rights”? Are not all civil liberties in the end autonomy-related?²¹¹

I believe that this kind of perspective provides a questionably narrow and one-sided picture on autonomy, dignity and on the purpose and object of human rights protection under the Convention system. Without going into the wide literature dedicated to the understanding of the concept of human dignity,²¹² which is sometimes characterised as “something of a loose cannon, open to abuse and misinterpretation,”²¹³ based on Section 1.2.2 of this chapter, the point can be made that the relationship between dignity and autonomy can be seen as something very different as proposed so far in this present section. Following principled autonomy, based on the Kantian understanding of human dignity, an autonomous person worthy

²⁰⁸ C. Douzinas, *The End of Human Rights*, Hart Publishing, 2000, at 215.

²⁰⁹ G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, OUP, 2007, at 74; T. Campbell, “Human Rights: A Culture of Controversy”, (1999) 26(1) *Journal of Law and Society* 6-26, at 10.

²¹⁰ The close connection between human rights and liberalism has been seen even as overlapping each other. See e.g. M. Ignatieff, *Human Rights As Politics and Idolatry*, Princeton University Press, 2001.

²¹¹ D. Feldman, note 206 above, at 58. See also J. Griffin, *On Human Rights*, OUP, 2008.

²¹² See e.g. D. Beyleveld, R. Brownsword, note 205 above; D. Feldman, “Human Dignity as a legal value”, [1999] *Public Law* 682-702.

²¹³ D. Beyleveld, R. Brownsword, “Human Dignity, Human Rights, and Human Genetics”, (1998) 61 *Modern Law Review* 661-680, at 662.

of respect, acts in accordance with principles that can be principles for all. In that respect dignity means not only the individual dignity of the person, but the dignity of man as species.²¹⁴ That sort of dignity is not at the disposal of the individual, but is to serve also higher community values. Personal claims of autonomy are thus to be exercised “within the holistic conception of personhood that includes attributes of self-determination, equal worth, and respect, but also bounds and responsibility.”²¹⁵ This is the sort of dignity that also underlies the constitutional jurisprudence of number of European states including France, Hungary and most notably Germany.²¹⁶

The point being made here is that a convincing argument can be made that human dignity demands rather respecting communitarian values than committing to an individualistic conception of autonomy.²¹⁷ I want to suggest that, either way, the object and purpose of the European Convention on Human Rights remains one-sided and inadequate. Article 1 of the Universal Declaration of Human Rights does not only say that all human beings are born free and equal in human rights. It also says that all human beings are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. This second sentence of Article 1 has remained regrettably in the background compared to the first sentence. As the chapters 4 and 5 of this thesis demonstrate, it supports a formula for the interpretation of autonomy that is much more suitable for the twenty-first century than concentrating solely on the respect for the individual and his or her individualistic rights. Caring autonomy, as discussed in Section 1.2.1, above, already provided a starting point, in this respect, to think about autonomy in terms of relationships, trust and caring. Or to say it in terms of Article 1 of the Declaration of Human Rights – the exercise of autonomy should happen with reason, conscience and in the spirit of brotherhood.

²¹⁴ C. McCrudden, note 204 above, at 705.

²¹⁵ E.J. Eberle, note 145 above, at 128.

²¹⁶ E.J. Eberle, note 145 above.

²¹⁷ N. Rao, “On the Use and Abuse of Dignity in Constitutional Law”, (2008) 14 *Columbia Journal of European Law* 201-255; N. Rao, “Three Concepts of Dignity in Constitutional Law” (2011) 86 *Notre Dame Law Review* 183-271; J. Waldron, “Dignity and Defamation: The Visibility of Hate”, (2010) 123 *Harvard Law Review* 1597-1657; L.M. Henry, “The Jurisprudence of Dignity”, (2011) 160 *University of Pennsylvania Law Review* 169-233.

1.4. Conclusion

Using the context of the Human Rights Court's case law, this chapter outlined three different concepts of autonomy – caring autonomy, principled autonomy and individual autonomy – as representing three different normative understandings about ourselves and our relationships to others. Caring autonomy recognises human beings as interdependent and considers important fulfilling commitments that particular contexts of relationships require. Principled autonomy requires acting on certain sorts of principles that can be principles or laws for all, measured by reference to some purportedly universal standard of values. Individual autonomy means that each individual has the right to choose how to be and become the kind of person she wants to be, and to have her own self-chosen lifestyle. Individual autonomy is about living a self-authored life: living according to values that are one's own.

Concurrently it was argued that these different concepts of autonomy represented three different choices open for the Court for interpreting autonomy under its Article 8 jurisprudence. The chapter argued that out of the three concepts the Court chose individual autonomy. For many European human rights law commentators this choice seemed to be rather self-evident and uncontroversial. Further to individual autonomy's philosophically idealistic appeal, I proposed that this unanimity is based on the assumption that the individual autonomy-based understanding of Article 8 rights exists on multiple justifications rooted in principles and techniques that are either built into the Convention system or have been grafted on to it by the Convention system. Considering the adoption of individual autonomy in the light of dynamic interpretation, comparative interpretation and interpretation in light of the object and purpose of the Convention, it was found that the inclusion of the concept under the Convention system has proceeded in an uncritical and potentially misconceived manner. Moreover, nothing in the Convention prescribes that individual autonomy can and should be the most suitable model to underlie the interpretation of Article 8 guarantees. In fact, considering that the Universal Declaration of Human Rights casts light on the object and purpose of the

Convention, the concept of autonomy should not just concentrate on individual wishes and desires, but it should be considerate also towards others and their needs.

A critical analysis of the autonomy-related ECtHR Article 8 case law is, therefore pertinent and needed. The next chapter, accordingly, proceeds to analyse the possible impact the practice of the Human Rights Court, expressed and shaped through its autonomy-based case law, has on the dispositions or behaviour of individuals, and therefore, on the social relationships these individuals are involved in. In other words, it questions whether the individualistic concept of autonomy is an appropriate tool to regulate interpersonal relationships in the contexts of, e.g. reproduction or medical decision-making.

CHAPTER 2

EXPRESSIONS OF INDIVIDUAL AUTONOMY

2.1. Introduction

Individual autonomy has developed into a core value of European human rights protection. There is an increasing recognition of the individual autonomy-based understanding of the European Convention on Human Rights Article 8 rights. A wide array of matters pertaining to private and family life, matters related to health, dying, reproduction, etc., are being approached as affairs of individual autonomy – that of personal choice and control. The previous chapter argued that despite individual autonomy being perhaps the most obvious choice for regulating matters under the Article 8 jurisprudence – supported by social and technological developments, influences from other jurisdictions and its close resonance with the liberal understanding of human rights protection – it was not the only possible choice available for the Court within the European Human Rights Convention framework. The aim of this chapter, along with the two upcoming chapters, is to make the case why this choice – the adoption of the concept of individual autonomy to underlie the interpretation of Article 8 guarantees – is unsuitable for the protection of private life of the European Convention on Human Rights.

While in the next chapter I argue that the concept of individual autonomy is inadequate to regulate interpersonal matters from the social perspective – interdependence rather than independence, in-insufficiency rather than self-sufficiency, characterises the way we organise and deal with the complexities of everyday life – my focus for the present chapter is on the role of the European Court of Human Rights to foster this, greatly idealised yet impoverished, image of individual independence and self-sufficiency. The chapter, hence, asks what possible impact does the practice of the Human Rights Court, expressed and shaped through its autonomy-based case law, have on the dispositions or behaviour of the

individuals, and from there on, on the social relationships these individuals are involved in. In other words, the underlying purpose here is to investigate how the expansion of “individual autonomy rights” onto the specific areas of life and particular relationships affects human relations and the capacity it provides for autonomy to remodel them. And, at an even more basic level, recognition of some of the implications the autonomy-related case law involves refashioning our understanding and perceptions about ourselves, our relations to others and about society in general.

My central claim in this chapter is that the individual autonomy-based practice now developing under the European Court of Human Rights Article 8 jurisprudence does the following: (a) fosters a particular type of individual – an independent and isolated yet active and flexible individual with a self-protective stance towards others around him or her, and; (b) directs human relations into formalism and proceduralism guided by contract-based models of interaction. Although the Court does not adumbrate these characteristics *per se*, it proves to be effective for retaining control over personal affairs and in the battles against other subjects of autonomy. Yet while one’s personal sphere is very often, in one way or another, closely interconnected with that of the family members, relatives, close friends etc., promoting the virtues of an isolated individual potentially turns human relations to non-emotional, calculated places of alienation and combat.

Drawing from insights of moral philosophy and ethics, I further contend that this kind of normative picture of individual conduct is highly problematic in the context of personal relationships. The “moral space” in which interpersonal relationships reside is not necessarily coincident with a set of rules that govern interactions between state and individual or between that of the strangers. This picture of morality might work adequately as long as we are in fact talking about interactions about strangers, especially strangers whose relationship is adversarial. The concept of individual autonomy may fit into the relationship of state versus individual, but it acts differently when applied to medical or family settings. It overlooks many kinds of questions that are crucial to morality, and ignores the features of personal relationships that make them personal and worth having. Hence, by exalting a rather

thin and limited conception of autonomy into the centrepiece of more and more areas of personal life, there is not just the worry that it gives us a distorted picture of human condition, there is also the worry that something valuable gets lost. Placing autonomy at the heart of doctor-patient relationships, or regulating the relationships within the family or partnership circle, substitutes the, so far, implicit expectations of care with explicit contractual rules of calculability and self-defensiveness. Because of these inherent limits, individual autonomy cannot be constitutive of social life and interpersonal relationships.

The inquiry into the expressions of autonomy under the ECtHR practice – with the special focus on its impact on human relations – is divided into two main sections. The first point of inquiry is the vision of human nature or human character purported by individual autonomy through the ECtHR case law. My aim is to identify the identity of the subjects of autonomy rights as they result in the decisions of the ECtHR. What is being asked is: what kind of a person is shaped and formed under the ECtHR jurisprudence? What are the necessary characteristics of the subject of autonomy and what is the effect of those characteristics on our understanding about ourselves and our relations to others? Who is the “human” of autonomy rights? For these purposes I frame my argument around three cases pertaining to assisted reproduction.¹ Since reproduction is intrinsically an endeavour that involves the participation of more than a single person, I think the cases provide an especially good case study to investigate what kind of human being is implied in the Court’s reasoning and what is the impact of this picture of a human person on interpersonal relationships. However, other autonomy-based cases could have been taken from the Article 8 jurisprudence to illustrate the same issues. This line of reasoning is not only particular to matters of reproduction.

Based on an abortion case,² the second part of the chapter focuses on the way the Human Rights Court structures interpersonal relationships through the safeguards it provides to secure respect for individual autonomy. My claim is that as the result of

¹ Case of *Evans v the United Kingdom* (App.6339/05), Judgment of 10 April 2007; Case of *Dickson v the United Kingdom* (App.44362/04), Judgment of 4 December 2007; Case of *S. H. v Austria* (App.57813/00), Judgment of 3 November 2011.

² Case of *Tysiąc v Poland* (App.5410/03), Judgment of 20 March 2007.

the reasoning provided by the Court, personal relationships become potentially more adversarial and antagonistic.

2.2. Legal images of an autonomous person

The account of autonomy, e.g. individual autonomy, which has gained prominence under the ECtHR Article 8 case law, presents itself largely as a descriptive term.³ By this I mean that an individual's right to respect for autonomy does not rest on an assessment of the moral quality of his or her actions or choices ("the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned"⁴). The ECtHR Article 8 case law is based on the presumption that how individuals act, or the reasons why they choose to act, is, from the moral point of view, irrelevant, provided they act autonomously – that is, with sufficient understanding and freedom from outside control ("a mentally competent adult who knows her own mind, who is free from pressure and who has made a fully informed and voluntary decision"⁵).⁶ Indeed, such views on autonomy are sometimes called "value-neutral" accounts in that they attempt to define autonomy without direct reference to the content of the value systems that define and motivate agents.⁷ Autonomy is viewed as a property of individuals, and specifically as a form of individual independence.⁸ The existence of autonomous choice depends on compliance with what might be called "technical, non-ethical tests for mental competence"⁹ and on standards set for the decision-making process, e.g. informed consent procedures in medical practice. It is not the particular choice that makes it

³ J.P. Safranek, "Autonomy and Assisted Suicide: The Execution of Freedom", (1998) 28(4) *Hastings Center Report* 32-36, at 32.

⁴ Case of *Pretty v the United Kingdom* (App.2346/02), Judgment of 29 April 2002, para 62.

⁵ *Pretty v the United Kingdom*, para 72.

⁶ K. Veitch, *The Jurisdiction of Medical Law*, Ashgate, 2007, at 69; J.P. Safranek, note 3 above, at 32; C. Mackenzie, "Relational Autonomy, Normative Authority and Perfectionism", (2008) 39(4) *Journal of Social Philosophy* 512-533, at 512.

⁷ J. Christman, "Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves", (2004) 117 *Philosophical Studies* 143-164, at 151; P. Droege, "Life as an Adjunct: Theorizing Autonomy from the Personal to the Political", (2008) 39(3) *Journal of Social Philosophy* 378-392, at 381.

⁸ N.C. Manson, O. O'Neill, *Rethinking Informed Consent in Bioethics*, CUP, 2007, at 18.

⁹ K. Veitch, note 6 above, at 69.

worthy of respect, but rather the act of choosing; the actions of will rather than their result. In other words, the focus is on “*how* a decision is made, rather than *what* is decided.”¹⁰

Without specifying the moral character of any particular act, this view of autonomy then promises an individual to live a life after his or her version of the “good” – whatever it is at a particular moment – requiring duties of restraint to prevent the State from imposing particular values. In practice, however, as I will show, this illusion of State neutrality disguises normative commitments to certain standards of moral behaviour or character that are considered essential components of autonomous action. In other words, in order for an individual to have a justiciable right to live a life of her own choosing, she or he must first meet certain standards of normality and character traits that are deemed appropriate for an autonomous person exercising an autonomous choice. In other words, if you want to have your choices respected you need to conform to certain characteristics and dispositions. Therefore, in terms of assessing the moral quality of an individual’s behaviour, the difference between individual autonomy compared to other forms of autonomy (e.g. caring autonomy and principled autonomy, both briefly discussed in the previous chapter) is marginal since in actuality they *all* define certain standards for moral behaviour.

These points – the way the Human Rights Court moulds the behaviour, conduct and character of individuals according to the ideal of individual autonomy – are illustrated in the next section by reference to three reproduction cases from the practice of the ECtHR.

2.2.1 When the other is on the way

2.2.1.1 *Evans v the United Kingdom*

This case arose out of a claim made by Ms Evans arguing for her right to respect for her decision to become a parent in a genetic sense. Ms Evans and her partner at the time, Mr Johnston, had commenced a procedure for *in vitro* fertilisation. Shortly thereafter, Ms Evans was diagnosed with pre-cancerous tumours in both ovaries,

¹⁰ P. Droegge, note 7 above, at 381.

which meant that they had to be removed. The hospital advised her that it would be possible before the necessary operation to “harvest” her eggs, fertilise them with the gametes of her partner and freeze the embryos, in order to keep alive her hope to bear a child in the future. In the United Kingdom, such a procedure is regulated by the Human Fertilisation and Embryology Act 1990 (the 1990 Act),¹¹ provisions of which allow both parties to withdraw their consent at any time before the implantation of the embryos in the uterus. Though Ms Evans was interested in whether it was possible to freeze her unfertilised eggs, she was informed that this procedure, which had a much lower chance of success, was not performed at the clinic. Also, her partner reassured her that he was committed to having a baby with her. Two years later, however, the relationship broke down. As a result, Mr Johnston asked the clinic to destroy the embryos. In these circumstances Ms Evans commenced court proceedings requiring Mr Johnston to restore his consent and arguing, *inter alia*, that the relevant legislation was incompatible with her human rights.

In particular, she claimed that the regulatory framework of the 1990 Act constituted a breach of her freedom from interference in her private life under Article 8 of the ECHR by requiring that the clinic not treat her without the on-going consent of her former partner. The applicant stressed that the female’s role in IVF treatment was much more extensive and emotionally involving than that of a male. Her emotional and physical investment in the process far surpassed that of the man and justified the promotion of her Article 8 rights. The applicant was also not satisfied that the 1990 Act operated in a way where her rights and freedoms in respect of creating a baby were dependent on her former partner’s whim. Since Mr Johnston had given Ms Evans belief that he wished to be the father of her children, and that the relationship between them would continue, Ms Evans had relied on that statement and opted to create embryos using his gametes, instead of freezing eggs. Hence, Mr Johnston should not be allowed to withdraw his consent. All of the court instances, however, rejected her request. At the final stage of her appeal the Grand Chamber of the

¹¹ Though the 1990 Act is now amended by the Human Fertilisation and Embryology Act 2008, the references made here are to the 1990 Act as the one in force during the dispute.

ECtHR found on the 10th of April 2007 against Ms Evans by a majority of thirteen to four. The reasons for this unanimous understanding of the law were the following.

According to the Grand Chamber of the ECtHR the central dilemma in the case was that it involved a conflict between the Article 8 rights of two private individuals. Both of the rights under question – the right to respect for the decision to become a parent and the right to respect for the decision not to become a parent – concerned the right to respect for choices made by individuals with regard to their private life, encompassing aspects of “an individual’s physical and social identity, including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world.”¹²

Hence, both parties claimed respect for the same right, arguably of the same intensity,¹³ regulated in the same way by the statutory requirement of consent. The Court was accordingly faced with a problem of how to resolve identical rights of two individuals within one and the same relationship. How did the Court proceed?

The majority of the Grand Chamber of the Human Rights Court noted the strong policy considerations in the current situation that had persuaded the State to adopt a rule permitting no exceptions to the requirement of consent by both gamete providers continuing up to the point of implantation of the embryo. The rationale for this was “respect for human dignity and free will” and “to ensure a fair balance between the parties to IVF treatment.”¹⁴ In addition to the public interest for upholding the primacy of consent, the Court was convinced that the consent requirements were implemented in this case accurately also in practice. The Grand Chamber found that the clinic carrying out the IVF treatment had properly explained to Ms Evans the consent provisions and obtained thereafter her written consent as required by law. Whereas the Court was aware that the applicant’s medical condition pressured her to make a decision quickly and under extreme stress, she must have nevertheless

¹² *Evans v the United Kingdom*, para 71.

¹³ *Evans v the United Kingdom*, para 80: “While the applicant contends that her greater physical and emotional expenditure during the IVF process, and her subsequent infertility, entail that her Article 8 rights should take precedence over J’s, it does not appear to the Court that there is any clear consensus on this point.”

¹⁴ *Evans v the United Kingdom*, para 89.

known, according to the Court, that “these would be the last eggs available to her, that it would be some time before her cancer treatment was completed and any embryos could be implanted, and that, as a matter of law, J would be free to withdraw consent to implantation at any moment.”¹⁵

The Grand Chamber was satisfied that the domestic rules were clear and brought to the attention of the applicant, and that no violation of Article 8 of the Convention occurred.¹⁶

Four of the seventeen judges dissented.¹⁷ Contrary to the majority opinion, the dissenting judges were much more sympathetic towards Ms Evans, her desires and her particular condition. They agreed with Ms Evans’ contention that part of the purpose of reproductive medicine was to provide a possible solution for those who would otherwise be infertile. According to the dissenting judges, that purpose was frustrated if there was no scope for exceptions in special circumstances. The minority considered it important that (a) it was Ms Evans’s very last chance to have a genetically related child; (b) Mr Johnston, knowing well this fact, gave her an assurance that he wanted to be the father of her child and (c) Ms Evans’ situation made it rather unreasonable to expect her to contemplate the probability of Mr Johnston withdrawing his consent. Under these circumstances they found that Ms Evans’ right to decide to become a genetically related parent should have weighed heavier than that of Mr Johnston’s decision not to become a parent.

After having outlined the circumstances and the Court’s position on the case, we can now tackle the question posed for this chapter: what kind of a human being is implied in the reasoning of the autonomy-based judgments of the ECtHR?

2.2.1.2 Autonomous person – detached and independent

In order to come up with some answer to the question posed, I start with the context of the case – reproduction. Reproduction is a process that typically requires the

¹⁵ *Evans v the United Kingdom*, para 88.

¹⁶ *Evans v the United Kingdom*, para 92.

¹⁷ *Evans v the United Kingdom*, Joint dissenting opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Zmiele.

involvement of two individuals, one of each sex, to create a new offspring. The content of both the right to respect for a decision to become a parent and not to become a parent is, hence, unavoidably constitutive of a relationship. No matter which party makes a decision, it affects, in one way or another, the other party. Echoing Onora O'Neill in this matter, reproduction is intrinsically not an individual project.¹⁸ Technological advancements and the repeated insistence on reproductive autonomy not to restrict access to assisted reproductive technologies have substantially, however, challenged the relational character of procreation.

It is true that assisted reproductive technologies have significantly altered the essence of the process of procreation – it is possible now to break down very clearly the different stages of the process (collecting semen/eggs, creating an embryo, embryo implantation in the uterus), to involve third parties (using ova or sperm from the donors or employing a surrogate mother), or to create an impression that it is, in effect, a purely individual project (a single woman using the sperm of an unanimous donor). In line with this understanding, Elaine Sutherland, for instance, argues that since donated gametes are frequently used without the participants knowing the identity of the others, it consequently eliminates the “problem” of the other party, e.g. the corresponding duty of the donor to procreate: “It is simply the fact that gametes are available that raises the prospect of an individual pursuing the opportunity to procreate.”¹⁹

Parallel to the progress in medicine and technology, several influential philosophers and bioethicists express the idea that reproduction is a key component of individuals' life plans and that individuals should, as much as is possible, be free to determine their own fates and settle the questions about reproduction by themselves.²⁰ These scholars see procreation as involving the freedom to choose one's own lifestyle and

¹⁸ O. O'Neill, *Autonomy and Trust in Bioethics*, CUP, 2002, at 65.

¹⁹ E.E. Sutherland, “‘Man Not Included’ – Single Women, Female Couples and Procreative Freedom in the UK”, (2003) 15(2) *Child and Family Law Quarterly* 155-171, at 162.

²⁰ R. Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*, Vintage Books, 1994, at 166; J. Robertson, *Children of Choice: Freedom of the New Reproductive Technologies*, Princeton University Press, 1994, at 30; E. Jackson, “Conception and the Irrelevance of the Welfare Principle”, (2002) 65 *The Modern Law Review* 176-203.

the way to express one's deeply held beliefs and morals.²¹ Without going into the extensive literature dedicated to the scope and limits of reproductive or procreative autonomy,²² the point I want to make here is that the possibilities created by new technologies coupled with increasing appeals to autonomy in reproduction matters, contributes to the idea that reproduction is essentially an individual matter – an important form of self-expression of one's individual autonomy.

Indeed, the Human Rights Court in *Evans* seemed to be persuaded by the fact that since it is now technically possible to keep human embryos in frozen storage, it gives rise to “an essential difference between IVF and fertilisation through sexual intercourse.”²³ This difference made it for a State legitimate, “and indeed desirable,”²⁴ to set up an appropriate legal scheme. The United Kingdom solution to this “essential difference” was centred on the doctrine of consent. Written consent of each gamete provider was needed concerning the treatment provided by the clinic, and most importantly, each of the gamete providers was provided with the “power freely and effectively to withdraw consent up until the moment of implantation”.²⁵ To sum it up with the words of Ruth Deech, the former chair of the Human Fertilisation and Embryology Authority: “[the] British attitude is very insistent on consent as the key to dignified and independent use of a person's genetic material. The preservation of bodily integrity and control over one's own genetic material is paramount.”²⁶

Following the British line of thought in *Evans*, the Court arguably then suggests that reproduction is about two separate choices of two separate individuals. The

²¹ J. Harris, “Rights and Reproductive Choice”, in J. Harris, S. Holm (eds) *The Future of Human Reproduction: Ethics, Choice and Regulation*, Clarendon Press, 1998, 5-37, at 35.

²² See e.g. M.H. Shapiro, “Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives”, (1996) 47 *Hastings Law Journal* 1081-1221; J.A. Robertson “Assisted Reproductive Technology and the Family”, (1996) 47 *Hastings Law Journal* 911-933; J.A. Laing, “Artificial Reproduction, the “Welfare Principle”, and the Common Good”, (2005) 13 *Medical Law Review* 328-356; R. Sparrow, “Is it “Every Man's Right to Have a Baby If He Wants Them”? Male Pregnancy and the Limits of Reproductive Liberty”, (2008) 18(3) *Kennedy Institute of Ethics Journal* 275-299.

²³ *Evans v the United Kingdom*, para 84.

²⁴ *Ibid.*

²⁵ *Evans v the United Kingdom*, para 79.

²⁶ R. Deech, “The legal regulation of infertility treatment in Britain” in S.W. Katz et al. (eds) *Cross Currents: Family Law and Policy in the US and England*, OUP, 2000, at 175.

interrelatedness and dependence on each other concerning any decision taken in this relationship and during the course of things was, indeed, not part of the Court's reasoning. Its implicit presence was rather recognised as an obstacle for the employment of the Court's standard adjudication methods²⁷ as "each person's interest is entirely irreconcilable with the other's, since if the applicant is permitted to use the embryos, J will be forced to become a father, whereas if J's refusal or withdrawal of consent is upheld, the applicant will be denied the opportunity of becoming a genetic parent."²⁸ The case was all about two separate, independent, autonomous decision-makers; about "two individuals, each of whom is entitled to respect for private life."²⁹

It is hard to agree with this position. Although developments in medical technology and changing social mores make it increasingly commonplace to assume that reproduction can be solely an individual matter, I think it crucially overlooks one of the core purposes of procreation – that it is undertaken exactly because it creates close human connections and bonds. The choice to reproduce is, therefore, linked at every stage – from making the decision to exercising the decision – to that of autonomy of another person or the person to be. While it is even noted in *Evans* that the protection of Article 8 encompasses the right to establish and develop relationships with other human beings and the outside world,³⁰ it remains unclear what kind of an impact this relational aspect of Article 8 or that of autonomy has on protecting the choices made in these relationships in practice. It seems that there is none. The Court's direction towards supporting the understanding of an individual as an independent decision-maker is, on the other hand, vividly present. The language the majority is using refers to completing the status of a person, rather than of a relationship: e.g. "being a parent" rather than "having a child".

²⁷ For an excellent analysis on these matters see J. Bomhoff, L. Zucca, "The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights", (2006) 2 *European Constitutional Law Review* 424-442.

²⁸ *Evans v the United Kingdom*, para 73.

²⁹ *Ibid.*, para 69.

³⁰ *Ibid.*, para 71.

2.2.1.3 Autonomous person – self-sufficient and in control

In order to fulfil one's wishes and decisions – to become or not to become a parent – independence as detachment is not alone, however, enough. One has to have the capacity to make one's own way in the world. In pursuit of this ideal, independence requires self-sufficiency and insulation of the risks.³¹

There is the will and interest of Ms Evans to have a child genetically related to her. Her wish is not about becoming a mother in a social, legal or even physical sense, since there is no rule of domestic law or practice to stop her from adopting a child or even giving a birth to a child originally created *in vitro* from donated gametes.³² She is determined to pursue the goal of becoming a mother in a genetic sense. However, as the case indicates, she lost her guard at one point and made herself vulnerable to Mr Johnston. Since egg freezing has a much lower chance of success and her partner reassured her about his intentions of having a child with her, she decided to trust him. That did not fit well with the ideal of individual autonomy as independence and self-sufficiency and the consent procedures guaranteeing it. Upholding Mr Johnston's autonomy rights – his decision not to become a parent – the Human Rights Court noted that although the applicant was pressed to take the decision and was under a lot of stress, she knew that those were her last eggs available to her and that Mr Johnston was free to withdraw his consent to implantation at any moment.³³

We can repeat this exercise looking from the standpoint of Mr Johnston. Being in control of his own life story similarly drove Mr Johnston's interest. In that sense Mr Johnston's and Ms Evans' positions did not differ much. The key thing for him was to be able to choose when, and if, and with whom he would have a child.³⁴ At the time of the creation of embryos he was in a relationship with Ms Evans. He might have had some hesitations about going through the IVF, but he possibly knew also that uncovering his doubts might make Ms Evans leave him, since she was so

³¹ B. Hoffmaster, "What Does Vulnerability Mean?", (2006) 36(2) *Hastings Center Report* 38-45, at 42.

³² *Evans v the United Kingdom*, para 72.

³³ *Evans v the United Kingdom*, para 88.

³⁴ BBC news, "Woman loses final embryo appeal", 7 April 2007, available at: <http://news.bbc.co.uk/1/hi/6530295.stm>.

determined to have a child of her own.³⁵ Yet the context eventually changed and he fell out of love with Ms Evans. And the modern individual's argument goes that if you make a decision in one context, but then the context changes, the decision made will not be binding any more. The binding character of the decision would otherwise, in Bauman's words, "severely limit the freedom one needs to relate anew."³⁶ In a world that "is in flux, spinning ever faster, compulsively initiating, revising, rearranging, and discarding its relationships,"³⁷ it was only natural that he "had been doing his best to reassure the applicant that he loved her and wanted to be the father of his children; giving the truthful expression of his feelings at that moment, but not committing himself for all time."³⁸

Interestingly, after *Evans* was decided, the arguments *pro* individual autonomy got even stronger, but in this time in an effort to reach a solution where the both parties could exercise their autonomy and choices, independently from each other.³⁹ In his comment on *Evans* case Lind, for example, expresses his discontent about the case in the following way:

[b]ecause of for a woman in Evans' position, who wishes to have children who are genetically hers but discovers that she requires treatment that will render her infertile, the only realistic option is to create and store embryos, which, under current UK law, leaves her *dependent* upon the continued consent of the male gamete donor for her reproductive decision-making. A man facing infertility, in contrast, has the option of freezing and storing his sperm, over which he will retain *unilateral control* until he makes a final decision to use it for the creation of embryos.[Emphasis added.]⁴⁰

This rather confirms my point that the Court's reasoning urges people to take control over their lives. Every person is shaping his or her own life; everyone is a separate

³⁵ See *Evans v Amicus Healthcare Ltd and others*, [2003] EWHC 2161 (Fam), para 61.

³⁶ Z. Bauman, *Liquid Love: On the Frailty of Human Bonds*, Polity Press, 2003, at viii.

³⁷ See M. Kohn, *Trust. Self-Interest and the Common Good*, OUP, 2008, at ix.

³⁸ *Evans v the United Kingdom*, para 21.

³⁹ N. Prialux, "Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters", (2008) 16 *Medical Law Review* at 194-195. See also E. Jackson, "Degendered Reproduction", (2008) 16 *Medical Law Review* 346

⁴⁰ C. Lind, "Evans v United Kingdom – judgments of Solomon: power, gender and procreation", (2006) 18 *Child and Family Law Quarterly* 576.

(human) rights holder and author of her own life. Individual autonomy is first and foremost about owing duty for oneself to succeed.

I think the language of the dissenting judges, on the other hand, grasps much better the contextual nature of the case. They were dissatisfied that the majority did not give any weight to the fact that Ms Evans' partner gave her an assurance that he wanted to be the father of her child, and relying on that she acted in good faith.⁴¹ Further to that they noted that an embryo is a joint product of two people, and the act of destroying an embryo also involves destroying the applicant's eggs.⁴² According to the dissenting judges, the creation of the embryos should have been, then, the decisive moment from which point on Mr Johnston is not able to rescind his consent. In Chapter 5 I will come back to this suggestion and propose my own viewpoint of how the case should have been decided in the light of caring autonomy that incorporates the importance of interpersonal relationships and the corresponding responsibilities people have towards one another. For the time being, the point I want to stress here is that while, for the majority of the Grand Chamber, the case was about two independent individuals pursuing their separate wishes, the minority saw the case beyond the formal contractual sense and took into account the context of the situation and the relationship in which the individual lives.

2.2.2 When the other is ignored

To illustrate the point that, through the interpretation of individual autonomy, the Court implicitly fosters normative ideals of independence and self-sufficiency, I proceed with two more examples: *Dickson v the United Kingdom*⁴³ and *S.H. v Austria*.⁴⁴ Like *Evans*, *Dickson* and *S.H.* both concern the question of the "right to respect for the decision to become a parent."⁴⁵ Unlike in *Evans*, however, in *Dickson* and *S.H.* there was no dispute between the parties themselves. Each respective couple in these two cases wished to have a child together. I want to show that even

⁴¹ *Evans v the United Kingdom*, para 8 of the dissenting opinion.

⁴² *Ibid.*

⁴³ Case of *Dickson v the United Kingdom* (App.44362/04), Judgment of 4 December 2007.

⁴⁴ Case of *S. H. v Austria* (App.57813/00), Judgment of 3 November 2011.

⁴⁵ *Dickson v the United Kingdom*, para 66; *Evans v the United Kingdom*, para 71-72.

under the circumstances where the issue was clearly about a joint and mutual enterprise, the Court's language and reasoning in these judgments separated that enterprise into individual units. Whereas the *Dickson* case focused mainly on Kirk Dickson's "right to become a genetic parent" and Lorraine Dickson and her part in this endeavour was greatly missed by the Court, in *S.H.* the emphasis was on the couples' wishes and desires to have a child, and all possible repercussions on the child were ignored.

2.2.2.1 *Dickson v the United Kingdom*

Although I briefly mentioned *Dickson* in the previous chapter, the detailed parameters of the case were largely not introduced.⁴⁶ Therefore I will clarify the details of the case here.

Kirk Dickson was serving a life sentence in prison when he met Lorraine via the prison pen-pal network. Lorraine was at the time also serving a prison sentence. After she was released, she and Kirk got married. They wanted to have children together. Since conjugal visits were not allowed in prison and Kirk was also not allowed to visit home, there was no opportunity for them to conceive naturally. Considering that Lorraine would be 51 by the time Kirk had his first chance to be released from the prison, the couple applied for artificial insemination facilities. The Secretary of State's policy was that the requests for artificial insemination treatment by prisoners were granted only in exceptional circumstances. The Dicksons' request was refused based on three main arguments. First, their relationship was not tested within a normal environment. Second, there were concerns about the moral and material welfare of the future child, e.g. due to prolonged absence of the father. Third, the argument was raised about the importance of maintaining public confidence in the penal system.⁴⁷

The Dicksons appealed, but unsuccessfully. The national courts found that public and private interests had been correctly weighed by the authorities, and that the goals underlying the policy were lawful. The Dicksons appealed, thereafter, to the Human

⁴⁶ Ch 1, Section 1.2.2.

⁴⁷ *Dickson v the United Kingdom*, para 13.

Rights Court, arguing that the refusal of access to artificial insemination facilities breached their rights under Article 8 and/or Article 12 of the Convention. The Grand Chamber of the ECtHR upheld their appeal and concluded that the balancing of interests at the national instances had not been fair. The Grand Chamber did not agree with the Government's suggestion that losing the opportunity to beget children as a result of the imprisonment was an inevitable consequence of imprisonment. According to the Grand Chamber, there were no security issues involved in granting access to artificial insemination facilities, nor did it give rise to any financial or administrative requirements on the State.⁴⁸ Next, the Court held that, although maintaining public confidence in the penal system was a justified argument that supported the policy, the evolution of European penal policy was towards the increasing importance of the rehabilitative aim of the punishment. The latter required the rights of the prisoner not to be set aside.⁴⁹ As a final point, the Court considered that while the welfare of the child was relevant as a matter of principle and that the State has a positive obligation to ensure the effective protection of children, these interests could not prevent the applicants from attempting to conceive a child.⁵⁰ The Grand Chamber concluded that although the policy did not contain a blanket ban, there was no room for proportionality assessment, and the policy was incompatible with the Article 8 right.

Although a large part of this judgment seems to deal with the questions of penal policy rather than addressing directly the issue of the right to be able to beget a child under the Convention, *Dickson*, nevertheless, makes at least two points in terms of characterising the image of the person.

First, the judgment depends wholly on Article 8. Although the Dicksons were married and their aim was to found a family together, the Court did not raise the need to examine the case under Article 12 of the Convention.⁵¹ Of course, Article 12 is

⁴⁸ *Dickson v the United Kingdom*, para 74.

⁴⁹ *Dickson v the United Kingdom*, para 75.

⁵⁰ *Dickson v the United Kingdom*, para 76.

⁵¹ Article 12 provides right to marry: Men and women of marriageable age have the right to marry and to found a family, according to the national law governing the exercise of this right. Several scholars claim that "procreative freedom" or "reproductive liberty" derives directly from Article 12, but the ECtHR case law has not yet supported this view. See E.E. Sutherland, "Procreative Freedom and

known to be of very restricted application,⁵² its wording implying that only married heterosexual couples can claim the right to found a family.⁵³ But was not that precisely the case with the Dicksons? It was not about a single person or an unmarried couple seeking to found a family via assisted reproduction, but a “proper” married couple whose mutual wish was to have a child together.⁵⁴ Moreover, as Eijkholt notes, traditionally, the ambit of Article 8 did not relate to the “mere desire to found a family,” but required family life that “was already in existence.”⁵⁵ So why did the Court find under these circumstances that it was more appropriate to ground the protection of reproduction under Article 8? Or more importantly – what implications might such reasoning have for our understanding about the subject of autonomy rights?

I suggest that by examining the case uniquely in light of Article 8, the Human Rights Court confirms its position developed in *Evans* that reproduction can be projected as primarily an individual matter. In other words, it confirms the idea of seeing human beings as essentially being separate from each other. Relationships exist, but they are not treated as constitutive.

In fact, following the judgment, one could argue that the Dicksons would possibly be better off without each other. As Helen Codd notes, if Lorraine wanted to, she could

Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?”, (2003) 82 *Oregon Law Review* 1033-1065, at 1062; A. Alghrani, J. Harris, “Reproductive Liberty: Should the Foundation of Families Be Regulated?”, (2006) 18(2) *Child and Family Law Quarterly* 191-210, at 197.

⁵² C. McGlynn, “Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching Status Quo?”, (2001) 26(6) *European Law Review* 582-598, at 591.

⁵³ See also case of *Rees v the United Kingdom* (App.9532/81), Judgment of 17 October 1986, para 49: “[t]he right to marry guaranteed by Article 12 refers to the traditional marriage between persons of the opposite biological sex,” and the article is “mainly concerned to protect marriage as the basis of the family.” Arguably this position is somewhat relaxed now pursuant to *Goodwin v the United Kingdom*, where the Court seemed to have expressed the idea that the right to found a family is not tied to marriage. See A. Campbell, H. Lardy, “Transsexuals – the ECHR in Transition”, (2003) 53(3) *Northern Ireland Legal Quarterly* 209-253, at 226-227; S.L. Cooper, “Marriage, Family, Discrimination and Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights’ Jurisprudence on LGBT Rights”, (2011) 12(10) *German Law Journal* 1746-1763.

⁵⁴ Of course one could argue, as did Judge Bonello in his concurring opinion of the Chamber judgment (Case of *Dickson v the United Kingdom* (App.44362/04), Judgment of 18 April 2006) that “family” implies more than “mere forwarding of sperm from a distance in circumstances which preclude the donor from participating meaningfully in any significant function related to parenthood.” But if do deny certain married couples the right to found a family, why to let them get married in the first place.

⁵⁵ M. Eijkholt, “Right to Procreate is not Aborted”, (2008) 16 *Medical Law Review* 284-293, at 289.

seek to become pregnant by assisted insemination by a donor, or apply to adopt, as a single parent.⁵⁶ She was either given a chance to have a child with Kirk via assisted reproduction or she would not be able to procreate within marriage. Similarly, if Kirk would want to realise his (individual) autonomy, he would be better off to find a younger woman.⁵⁷

The second aspect I would like to address here confirms the first. The case is very much focused on Kirk Dickson and basically neglects the involvement of Lorraine Dickson, who was equally affected by the refusal of artificial insemination. The Grand Chamber discusses at length the questions whether the loss to beget a child is an inevitable consequence of imprisonment, whether allowing prisoners guilty of serious offences to conceive children would undermine the public confidence in the prison system, and whether the absence of a parent for a long time would have a negative impact on a child, reminding us only once that the second applicant was at liberty and was also expected to participate in the child's upbringing.⁵⁸

It could be argued that being married to a prisoner means that you are automatically and directly affected by your husband's or wife's prisoner status. But even if one is affected by it, this does not mean that his or her needs can be completely subsumed by it. It is important to include the prisoners' partners in the discussion so that their mutual situation is addressed, not just the prisoner's situation.

2.2.2.2 S.H. and others v Austria

In *S.H. and others*, the applicants – two couples – disputed the provisions of the Austrian Artificial Procreation Act that prohibited some techniques of artificial procreation using ova and sperm from donors. Heterologous fertilisation, banned by Austrian laws, was the only medical technique by which they could successfully conceive children. The applicants argued that a decision of a couple wishing to make use of artificial procreation is an expression of one's private life and that the

⁵⁶ H. Codd, "Regulating Reproduction: Prisoners' Families, Artificial Insemination and Human Rights", (2006) 1 *European Human Rights Law Review* 39-48, at 47.

⁵⁷ Note here that also the Court found a violation of the Convention, it did not say that Dicksons had, therefore, a right to assisted procreation.

⁵⁸ *Dickson v the United Kingdom*, para 74-76.

limitations to the use of artificial fertilisation set by the legislation was an unlawful interference to their Article 8 rights. The applicants further emphasised the special importance of a right to procreation, which should conduce to remove all legal barriers to the techniques of artificial reproduction.

The Austrian laws on artificial procreation were aiming to balance three underlying interests – the interests of human dignity, the freedom of procreation and the well-being of children. The laws wanted to prevent the forming of unusual parental relations such as a child having more than one biological mother, in order to protect the right of each child to a biological identity. The aim of the legislation was also to prevent the possible exploitation of women and the commercialization of ova, sperm, embryos and uterus. In this regard, the Austrian Government stressed that the central issue for them

[w]as not whether there could be any recourse at all to medically and technically assisted procreation and what limits the State could set in that respect, but to what extent the State must authorise and accept the cooperation of third parties in the fulfilment of couple's wish to conceive a child.⁵⁹

A further goal pursued by the national legislation was to avoid the risk of artificial fertilisation being used for selective eugenic reproduction. For all these reasons the Austrian legislation maintained a cautious approach to heterologous fertilisation, in particular when the donation of ova and surrogate motherhood is involved. In the Austrian legislation the “wish of a child” – to use the Court's language – was valued and supported, but it was not considered as an absolute trump.⁶⁰

As third party interveners, Germany and Italy both supported the Austrian concerns about the possible problems of splitting motherhood into two categories: genetic and biological. This was, according to the interveners, problematic as well in terms of the child's welfare (the possible negative impact on the child's psychological and social development), and also as causing potential conflicts between the genetic and the

⁵⁹ *S.H. and others v Austria*, para 63.

⁶⁰ *S.H. and others v Austria*, para 64.

biological mother (for example in case of an illness or handicap of the child). Additionally, the concern of women's exploitation was raised as well.⁶¹

In a rather unusual way, instead of basing its reasoning on present day evidence (November 2011 at the time judgment), the European Human Rights Court based its examination of the case on the scientific state and social consensus as it existed in 1998 in Austria, when the dispute was considered by the Austrian Constitutional Court. This aspect was critical to the outcome of the judgment. This led the Grand Chamber of the Court to find that the Responding State was not, at that time (1998), exceeding its margin of appreciation and no violation of Article 8 was found.⁶²

However, considering the way the Court constructed the case and the weight it gave to the parents' "right to have a child", it is likely that if the case had been assessed under the "present-day conditions" then a violation of Article 8 would have been more than a realistic outcome.⁶³

Drawing from, among others, *Pretty*, *Evans* and *Dickson*, the Grand Chamber of the Human Rights Court considered that the private life aspect within the meaning of Article 8 covered the desire of couples or life companions to have children as one of the essential forms of expression of their personality as human beings.⁶⁴ Importantly, unlike the Chamber that considered the case under Article 14⁶⁵ taken together with Article 8, the Grand Chamber limited its examination to Article 8 taken alone. Like in *Dickson*, we can see the Court's continuing willingness to give Article 8 an enhanced role to regulate matters pertaining to procreation and reproduction.⁶⁶

⁶¹ *S.H. and others v Austria*, para 69-73.

⁶² *S.H. and others v Austria*, para 115.

⁶³ *S.H. and others v Austria*, para 117-118: "[t]he Court observes that the Austrian parliament has not, until now, undertaken a thorough assessment of the rules governing artificial procreation, taken into account the dynamic developments in science and society...Even if it [the Court] finds no breach of Article 8 in the present case, the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States."

⁶⁴ *S.H. and others v Austria*, para 80-82.

⁶⁵ Article 14 provides prohibition of discrimination. This guarantee has no independent existence, however, relating solely to "rights and freedoms set forth in the Convention."

⁶⁶ See also *S.H. and others v Austria*, Joint dissenting opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria, para 3.

The great emphasis that the case gives to the importance of one's individual autonomy, and to one of its expressions – the right for respect to choose to have a biological child – becomes more evident once the case is examined in further detail. As the first step, the Court decided that, rather than the State's positive obligations, State's negative obligations were at stake in this case. Although on several occasions the Court has noted that it is not always clear-cut and possible to define the question of whether the measure at issue should be deemed to be an interference by a public authority, or an alleged breach of a positive duty under Article 8,⁶⁷ I think in this particular case the distinction between these two aspects of a right mattered. It mattered because framing the issue as one of "involving an interference with the applicants' right to avail themselves of techniques of artificial procreation"⁶⁸ made it possible to abstain from addressing directly the issue of the extent that the State must provide the cooperation of third parties.⁶⁹ It made it easier to neglect the other poles of the relationship – the gamete donors. Structuring the case as one of interference to the applicants' Article 8 rights meant that if only the laws were not prohibiting, the respective "services" would have been freely available. By structuring the case this way, the Court was able to overlook the presence of the "other" parties involved in artificial procreation matters in their case reasoning and judgment.

The subsequent reasoning of the Court conforms to this structure. Addressing the Government's concerns that medically advanced techniques of artificial procreation carried the risk that they would not be used only for therapeutic purposes, but for "selection" of children, or that the ovum donation posed a risk of exploitation or humiliation of women, the starting point for the Court was always an individual's wish to have child. Since the legislation had already in place several specific safeguards and precautions to prevent the potential risks of eugenic selection or to prevent the exploitation of women in vulnerable situations as ovum donors, "the Austrian legislature could...devise and enact further measures and safeguards to

⁶⁷ See *Evans v the United Kingdom*, para 75; *Case of Odièvre v France* (App.42326/98), Judgment of 13 February 2003, para 40.

⁶⁸ *S.H. and others v Austria*, para 88.

⁶⁹ See the text and footnote 52 above.

reduce the risk attached to ovum donation.”⁷⁰ Further, considering the risk associated with creating the relationships in which the social circumstances deviated from the biological one, the Court, drawing a comparison with the institution of adoption, again noted that “a legal framework satisfactorily regulating the problems arising from ovum donation could also have been adopted.”⁷¹ It is notable that the Court did not attempt to weigh the interests of donor women or children born into ambiguous family forms, *versus* that of aspiring parents’ wishes; the arguments were solely based on how efficiently the State could adopt some legislation to protect women from the risks of artificial procreation. It seems that the Court elevated the “desire” for aspiring parents to have a child to be the ultimate goal, and therefore was critical of the State for not finding a way to satisfy that goal. And, until the State does so, “there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria.”⁷²

In a way the applicants in *S.H. and others* are a good example of the image of the modern autonomous man that I maintain is being fostered by the Court’s interpretation of Article 8 in the light of the concept of individual autonomy. To make the point, it is worth quoting a paragraph from the judgment, which speaks for itself. Namely, in response to the Government’s concerns about allowing the use of either sperm or ova from the third parties, the applicants’ position was that

[t]he adverse effects relied on by the Government in arguing the necessity of the interference could be reduced, if not prevented, by further measures that the Austrian legislature could enact and, in any event, were not sufficient to override the interests of the applicants in fulfilling their wish for a child.⁷³

I accept that it is impossible to predict all the possible social and psychological repercussions for future children born through heterologous fertilisation. The concerns might be truly unsubstantiated. But do these children want their parents’ main concern to be the “fulfilment of their wish for a child” regardless of the welfare of that very child? Or is the welfare of the child solely the State’s problem, which

⁷⁰ *S.H. and others v Austria*, para 105.

⁷¹ *Ibid.*

⁷² *S.H. and others v Austria*, para 114.

⁷³ *S.H. and others v Austria*, para 102.

can be “reduced by further measures of the legislature?” The point is that the rhetoric of individual autonomy, such as in this case, does not invoke any concern or responsibility towards others, making its value highly questionable in situations, where interpersonal relationships are at hand.

2.2.3 Implications of an impoverished view of the individual

Based on the analysis of three ECtHR cases pertaining to reproduction, the previous section argued that even when dealing with an intrinsically relational matter, the implicit image of the person behind these autonomy-based cases is an independent and self-sufficient individual. The judgments hardly note any relational dimensions of human life. But by making this vision of individual autonomy normative, it is inevitably implied, as Glendon has said, that dependency is something to be avoided in oneself and disdained in others.⁷⁴ One important part of the human condition is lost.

Whereas independence, flexibility, assertiveness are valuable features of an individual, in the context of intimate relationship matters, they cannot be the only ones, or the most important ones. Otherwise, the result is an autonomy right(s) that nurtures a culture of unencumbered individuals and lonely persons, disentangled from all relationships.

2.3. Towards an adversarial model of personal relationships

Although on several occasions the Human Rights Court speaks of autonomy as something we may have a right to, it is suggested that this is hardly a plausible claim.⁷⁵ Rather, what the Court has in mind is that we have rights to things that serve or enhance autonomy. Autonomy being a good, but one that is defended by things

⁷⁴ M-A. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, The Free Press, 1991, at 73.

⁷⁵ J. Coggon, “Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?”, (2007) 15 *Health Care Analysis* 235-255, at 237.

that strengthen it.⁷⁶ The purpose of the law here is to support autonomous decision-making by setting up a framework that aims to guarantee respect for this good.

The framework that aims to guarantee respect for individual autonomy is my next examination point. My claim under this section is that through the framework that aims to guarantee respect for individual autonomy, the Human Rights Court's reasoning structures interpersonal relationships in ways that turns them into adversarial, contract-based relationships.

2.3.1 Tysi c v Poland⁷⁷

Alicja Tysi c had suffered from severe myopia since 1977. In 2000 she became pregnant with her third child. As she was worried about the possible impact of the delivery on her health she consulted her doctors. She was examined by three ophthalmologists, each of whom concluded that the pregnancy and delivery constituted a risk to her eyesight. However, despite the applicant's requests, they refused to issue a certificate for the pregnancy to be terminated on therapeutic grounds. The doctors concluded that it was not certain that the retina might detach itself as a result of pregnancy. Seeking further medical advice, the applicant consulted her general practitioner, who issued a certificate stating that the pregnancy constituted two types of threats to her health: the pathological changes in her retina and a risk of rupture of her uterus because her two previous deliveries had been by caesarean section. The applicant understood that on the basis of this certificate she would be able to terminate her pregnancy lawfully. In the second month of her pregnancy the applicant's eyesight deteriorated further. She contacted her local hospital with a view to obtaining the termination of pregnancy. A gynaecologist, who examined her, concluded that neither her short-sightedness nor her two previous deliveries by caesarean section constituted grounds for therapeutic termination of the pregnancy. The respective note was co-signed by an endocrinologist whom the gynaecologist consulted briefly during the applicant's visit, but who never talked to the applicant. As a result, the pregnancy was not terminated. The applicant delivered

⁷⁶ Ibid.

⁷⁷ Case of *Tysi c v Poland* (App.5410/03), Judgment of 20 March 2007.

the baby by caesarean section in November 2000. After the delivery Ms Tysi c's eyesight declined significantly. In March 2001 an ophthalmologist issued a medical certificate stating that the deterioration of the applicant's eyesight had been caused by recent haemorrhages in the retina. As a consequence the applicant was facing a risk of blindness. The disability panel declared her significantly disabled. She needed constant care and assistance in her everyday life.

The applicant lodged a criminal complaint against the gynaecologist, alleging that he had prevented her from having a lawful abortion. She complained that, following the pregnancy and delivery, she had sustained severe bodily harm by way of almost complete loss of eyesight. During the investigations, the district prosecutor heard evidence from the ophthalmologists who had examined the applicant during her pregnancy, and from a panel of three medical experts. All of them concluded that the applicant's pregnancies and deliveries had not affected the deterioration of her eyesight. According to the experts, the risk of retinal detachment had always been present and continued to exist. As a result, the prosecutor discontinued the investigations for the lack of a causal link between the gynaecologist's actions and the deterioration of the applicant's vision. Despite complaining that the investigation was procedurally flawed, the Warsaw Regional Prosecutor dismissed her appeal. The decision not to prosecute was then transmitted to the District Court for judicial review. The District Court upheld the decision to discontinue the case. The applicant also attempted to bring disciplinary proceedings against the doctors who refused to terminate her pregnancy. The Chamber of Physicians found that there had been no professional negligence.

Ms Tysi c filed an application with the Human Rights Court. The complaint had two limbs – substantive and procedural. As to the substantive part the applicant claimed that her right to physical and moral integrity had been violated since she had been seeking to have an abortion in the face of a risk to her health and the State's refusal to provide her with a legal abortion had left her exposed to such risk. On the formal or procedural part, the applicant maintained that the State had been under a positive obligation to provide a comprehensive legal framework regulating disputes between pregnant women and doctors as to the need to terminate pregnancy in cases of a

threat to a woman's health. She contended that it was inappropriate and unreasonable to leave the task of balancing fundamental rights to doctors exclusively. The Polish legal system did not provide any independent review system or any appropriate and effective procedural mechanisms to challenge a doctor's decision not to make a referral for termination; consequently, according to the applicant, this led to a violation of her Article 8 rights.⁷⁸

After finding that the applicant's case is related to her right for respect for private life, "encompassing...the right to autonomy, personal development and to establish and develop relationships with other human beings and the outside world,"⁷⁹ the Court concentrated on the second limb of the applicant's complaint, concurred with her, and concluded that the authorities had indeed failed to comply with their positive obligations to provide appropriate protection for the physical integrity of individuals in such a vulnerable situation such as the applicant.⁸⁰

2.3.1.1 Protecting individual autonomy through effective decision-making processes

Tysic was different compared to the earlier decisions of the Human Rights Court in the area of abortion, which were, by and large, determined by recourse to the margin of appreciation doctrine.⁸¹ This meant that the Court distanced itself from taking any substantive position in abortion matters and the States were left to draw the appropriate ethical and legal boundaries in the "interplay of the equal right to life of the mother and the "unborn"".⁸² Interestingly, the Court even seemed to attempt to

⁷⁸ *Tysic v Poland*, para 80-85.

⁷⁹ *Tysic v Poland*, para 107.

⁸⁰ *Tysic v Poland*, para 127.

⁸¹ See case of *Brüggeman and Scheuten v Germany* (App.6959/75), Commission's Report of 12 July 1977; Case of *H. v Norway* (App.17004/90), Commission's Decision of 19 May 1992; Case of *Boso v Italy* (App.50490/99), Decision of 5 September 2002; Case of *D v Ireland* (App.26499/02), Decision of 27 June 2006.

⁸² *D v Ireland*, para 90. The margin of appreciation is an interpretative principle used by the Court and refers to the room of manoeuvre the Court accords to national authorities in fulfilling their Convention obligations. The literature dedicated to margin of appreciation is vast. See among others N. Lavender, "The Problem of the Margin of Appreciation", (1997) *European Human Rights Law Review* 380-390; M.R. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights", (1999) 48 *International and Comparative Law Quarterly* 638-650; J.A. Sweeney, "Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War

detach itself from the previous abortion-related case law. Apart from a brief reference to *Brüggeman and Scheuten v Germany*,⁸³ the *Tysiāc* case does not aim to build any coherence or connection with already settled case law.⁸⁴ Even then, the Court was in this case equally disinterested in framing the case in terms of the “right to abortion”.⁸⁵ Instead of stepping into the feared and avoided territory of foetal interests and rights,⁸⁶ the case was framed as a procedural matter. The Court observed that although Polish law prohibits abortion, it provides it for certain exceptions. In particular, under section 4(a) 1(1) of the 1993 Family Planning Act, abortion is lawful, where pregnancy poses a threat to the woman’s life or health, certified by two medical certificates, irrespective of the stage reached in pregnancy. Since the applicant’s claim was based on her alleged right to medical care that was already declared legal, the Court found it “more appropriate”⁸⁷ to examine the case from the standpoint as to whether procedural safeguards for lawful therapeutic abortion in Poland were adequate to satisfy the requirements of Article 8:

While Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests.⁸⁸

Era”, (2005) 54 *International and Comparative Law Quarterly* 459-474; G. Letsas, “Two Concepts of the Margin of Appreciation”, (2006) 26(4) *Oxford Journal of Legal Studies* 705-732.

⁸³ *Brüggeman and Scheuten v Germany*.

⁸⁴ While the Human Rights Court is not formally bound to follow its previous judgments, it has remarked that “in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents.” Case of *Christine Goodwin v the United Kingdom* (App.28957/95), Judgment of 11 July 2002, para 74; Case of *I. v the United Kingdom* (App.25680/94), Judgment of 11 July 2002, para 54.

⁸⁵ *Tysiāc v Poland*, para 104 of the judgment. Judge Bonello found it necessary to stress independently that the Court was not concerned with any abstract right to abortion or with any fundamental right to abortion “lying low somewhere in the penumbral fringes of the Convention.” *Tysiāc v Poland*, Separate opinion of Judge Bonello, para 1.

⁸⁶ The Court has “successfully” managed that as well in earlier cases. See case of *Vo v France* (App.53924/00), Judgment of 8 July 2004.

⁸⁷ *Tysiāc v Poland*, para 108.

⁸⁸ *Tysiāc v Poland*, para 113.

By constructing the case in these terms, it arguably provided the Court a convenient basis to avoid addressing a couple of very difficult issues head on – the question about foetal rights and the question about the limits of women’s right to choose abortion.⁸⁹ Because of this kind of formulation, the case had allegedly nothing to do with substantive questions of the existence and limits of women’s right to choose or to the availability of abortion in general.⁹⁰ An individual’s right to autonomy played a seemingly modest part here. Following *Priaulx*, the significance of the case was in “affording a woman in the vulnerable position of Ms *Tysi c* a greater certainty as to her situation.”⁹¹

[r]ather than demanding that abortion be made available irrespective of merit, the Court’s concern was that there was a fair and unbiased process by which to determine ‘merit’ in the first place: ‘such a procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered.’⁹²

However, according to some commentators, this modest view on autonomy underestimated what the Court had actually said. Cornides was strongly convinced that the “formal requirements imposed on legislators wishing to foresee legal restrictions on abortion were so far-reaching that any regulation other than one granting unrestricted access to abortion became technically impossible.”⁹³ What Cornides seemed to have in mind was that despite the opinion of eight medical specialists who could not agree on the link between the applicant’s pregnancy and delivery and the deterioration of her eyesight, the Court pronounced that the procedural safeguards for lawful therapeutic abortion in Poland did not meet sufficiently the applicant’s “fears” that “the pregnancy and delivery might further endanger her eyesight” and “[t]hat her fears cannot be said to have been irrational.”⁹⁴

⁸⁹ See *Br ggeman and Scheuten v Germany*, para 60: “The Commission does not find it necessary to decide, in this context, whether an unborn child is to be considered as “life” in the sense of Article 2 of the Convention, or whether it could be regarded as an entity which under Article 8(2) could justify an interference “for the protection of others.””

⁹⁰ N. Priaulx, “Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive “Rights” and the Intriguing Case of *Tysi c v Poland*”, (2008) 15 *European Journal of Health Law* 361-379, at 376.

⁹¹ N. Priaulx, note 90 above, at 372.

⁹² *Ibid.*

⁹³ J. Cornides, “Human rights pitted against man”, (2008) 12(1) *The International Journal of Human Rights* 107-134, at 126.

⁹⁴ *Tysi c v Poland*, para 119.

The Court's reasoning seemed, hence, to favour the way the applicant defined her situation, causing the dissenting judge, Judge Borrego Borrego, even to suggest that the Court was favouring now "abortion on demand"⁹⁵ and Cornides to claim that the Court was attempting "to promulgate a full-fledged "right to abortion though the backdoor."⁹⁶

Following the reading of Judge Borrego Borrego and Cornides, the reach of autonomy, contrary to what Priaulx suggests, is a wide one. First and foremost it is about how somebody defines herself, her situation, her way of conducting her life. The procedural guarantees were there to meet the "subjective 'fears', 'distress' and 'anguish' of a pregnant woman."⁹⁷ Since the "fears" of the applicant outweighed the opinion of eight specialists, these commentators are doubtful whether any regulation other than granting unrestricted access to abortion becomes possible or is favourable in terms of human rights protection.

I agree with Cornides that the judgment does something different than it pretends to.⁹⁸ However, claiming that the case promulgated a full-fledged right to abortion is perhaps stretching things too far. According to my reading, what the Court does, "through the backdoor", is to accentuate the format of relationships based on adversarial contractual equality. And Cornides is right in stating that this form of relationship entails an independent and self-sufficient individual whose needs are paramount for the Court. Close personal relationships should not be, as will be argued below, adversarial. As Blustein notes, the "parties to them should only rarely conceive of themselves as separate beings with conflicts and antagonistic interests," since otherwise "those features of personal relationships that make them personal and worth having are [becoming] absent."⁹⁹

⁹⁵ *Tysiāc v Poland*, Dissenting opinion of Judge Borrego Borrego, para 13.

⁹⁶ J. Cornides, "Human rights pitted against man", (2008) 12(1) *The International Journal of Human Rights* 107-134, at 126-127. According to Cornides, the formal requirements imposed on legislators wishing to foresee legal restrictions on abortion are so far-reaching that any regulation other than one granting unrestricted access to abortion becomes technically impossible. See N. Priaulx, note 90 above, rebutting this idea.

⁹⁷ J. Cornides, note 96 above, at 127. See also *Tysiāc v Poland*, Dissenting opinion of Judge Borrego Borrego, para 9.

⁹⁸ J. Cornides, note 96 above, at 126.

⁹⁹ J. Blustein, "Care and Commitment: Taking the Personal Point of View", OUP, 1991, at 229.

2.3.1.2 ***Autonomous individual in action***

The thrust of the protection of one's autonomy lies, according to *Tysic*, in procedural guarantees. Decision-making procedures are needed in order to secure respect for "the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world."¹⁰⁰ Autonomy is respected when the process of decision-making is appropriately regulated and the relevant procedure followed in each particular case.

On this account, the procedural guarantees can be essentially seen as concerned with the constraint of power. As Montgomery notes, one of the threats to autonomy is external control.¹⁰¹ Requiring certain procedural safeguards to be put in place – to be heard in person, dispute settlement possibilities – is a mechanism to reduce the power exercised by health care professionals over their patients. If patients are informed of the facts and able to exercise choice, they are less vulnerable to being adversely affected by conduct of professionals. The aim is to promote the value of autonomy by creating the circumstances in which it can be exercised.¹⁰²

What are the particular safeguards the Court suggested that Poland adopt in order to protect the autonomy interests of the applicant? The Court emphasised a need for safeguards to apply "where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the doctors themselves."¹⁰³ In the Court's view, in such situations, the applicable legal provisions must, first and foremost, "ensure clarity of the pregnant woman's legal position."¹⁰⁴ Such measures were also demanded in order to clarify the position of doctors who might otherwise fear criminal prosecution: "the provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this [chilling] effect."¹⁰⁵ In this regard, the Court found that the State should ensure "some form of procedure before an

¹⁰⁰ *Tysic v Poland*, para 107.

¹⁰¹ J. Montgomery, "Law and the Demoralisation of Medicine", (2006) 26(2) *Legal Studies* 185-210, at 187.

¹⁰² *Ibid.*

¹⁰³ *Tysic v Poland*, para 116.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

independent body competent to review the reasons for the measures and the relevant evidence.”¹⁰⁶ The independent competent body should “guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered, [and] issue written grounds for its decision.”¹⁰⁷ Furthermore, the Court noted that since the time factor is of critical relevance for decisions to terminate pregnancy, the procedures should ensure that such decisions are timely, so as to limit or prevent damage to a woman’s health.¹⁰⁸

Additionally, while the Government contended that a variety of review mechanisms had been open to, or had in fact been applied to the applicant’s case, the Court was of the opinion that none of the review mechanisms were sufficient in providing appropriate protection for the applicant’s rights. Also, while the procedure for obtaining a lawful abortion provided for two concurring opinions of specialists, this, according to the Court, failed to distinguish between situations, where there was full agreement between women and their doctors, and those where there was none. The “safeguard” merely obliged a woman to obtain a certificate from a specialist without stipulating any steps that she could take in the context of disagreement. Furthermore, other “safeguards”, such as the acquisition of a second opinion in the context of therapeutic doubts, did not, in the Court’s view, provide any procedural guarantee for a patient in the context of conflicting views, since the provision merely addressed the medical profession. Nor indeed would either the civil law of tort or criminal proceedings as applied by the Polish courts afford the applicant a procedural instrument by which to vindicate her right to respect for her private life, given that these were retrospective measures. Retrospective measures would not be sufficient to provide appropriate protection for the physical integrity of individuals in such a vulnerable position as the applicant.¹⁰⁹

As one can see, the Court prescribes a plethora of procedural guidelines for the State(s) to implement in order to guarantee proper respect for one’s autonomy. In line with the idea of individual autonomy as independence and self-sufficiency one

¹⁰⁶ *Tysic v Poland*, para 117.

¹⁰⁷ *Tysic v Poland*, para 117.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Tysic v Poland*, para 120-127.

can understand what the Court is aiming for – to empower the pregnant woman and strengthen her capacity to exercise her autonomy by giving her the tools. I am doubtful, though, whether a person, “in such a vulnerable position as the applicant”,¹¹⁰ needs more opportunities to dispute a physician’s decision. It is hard to see how another instance of dispute settlement would have solved for the applicant the “situation of prolonged uncertainty.”¹¹¹ Here the law presumes the existence of an autonomous competent individual, who can enforce his or her rights. The law presumes in this way that the partners are equal in power and that they are detached from each other. But this is hardly the case with relationships in the realms of medicine or family. The reality is that people are vulnerable and interdependent, especially when pregnant and concerned about his or her health. What is rather needed is that one feels ensured that the doctor takes good care of the patient. The expectation generally is that the doctor is competent, compassionate, caring and communicates with the patient about her or his needs.¹¹² The patients need doctors to be focused on their care, and my doubt is that the procedural guarantees the Court found to be lacking in the Polish system do not prompt such commitments and responsibilities on the side of the physicians.

2.3.2 Implications for relationships

Protecting individual autonomy through procedural safeguards promises to keep the professional authority in control. Prescribing formulas for the decision-making process and requiring the formation of independent review boards for the decisions taken by physicians arguably reduces our vulnerability from paternalism. Simultaneously, people might feel empowered to be in control of their own lives and to shape it as they wish. One of the possible flipsides of these developments is that the guarantee mechanisms, required to protect individual autonomy, start to define the very relationships under issue. Relations between patients and physicians or that between family members, become formalised and regulated, and consequently

¹¹⁰ *Tysic v Poland*, para 127.

¹¹¹ *Tysic v Poland*, para 124.

¹¹² G.M. Stirrat, R. Gill, “Autonomy in Medical Ethics after O’Neill”, (2005) 31 *Journal of Medical Ethics* 127-130, at 129.

constrained in particular ways. One of the worries is that they crowd out beneficence, goodwill and caring attitudes in our relations with others.

In a similar vein, O'Neill argues that relationships between professionals and patients are inevitably reshaped when regulation and control are added with the aim of protecting dependent and vulnerable patients and when professionals are disciplined by multiple systems of accountability backed by threats of litigation on grounds of professional negligence in case of failure to meet these requirements.¹¹³ In this situation, O'Neill maintains, doctors, like many other professionals, find themselves pressed to be accountable rather than to be communicative, to conform to regulations rather than to respond to the particular needs of the relationship.¹¹⁴ And no regulation can exhaustively predict or cover the needs of patients, or specify the terms of empathy or compassion in providing care. Additionally, it makes it hard to expect the doctor to be caring towards the patient if the patient under the model of individual autonomy assumes a defensive posture rather contributing to the maintenance of a healthy relationship.

The application of contractual economic models to a new domain (family, medicine) should be taken, hence, with caution. The market model does not acknowledge mutual obligations, responsibility or care in intimate relationships if these are not literally contracted for. Nor does the principle of formal equality on which contracts are based redress the substantive inequalities in power that often exist in such relationships. Contract is a commitment device designed mainly for business transactions, negotiated normally between autonomous adult actors. In those, limited, contexts, it has positive impact for reducing parties' economic risks and potentially contributing to the overall economic growth.¹¹⁵ The majority of the relationships the Court has dealt with in the autonomy-related case law, however, concern matters between parties that are unequal in power and authority. For lovers – as in *Evans* – for the ill – as in *Pretty* – for pregnant women – as in *Tysiqc* – for husbands, fathers,

¹¹³ O. O'Neill, note 18 above, at 39.

¹¹⁴ Ibid.

¹¹⁵ A. Baier, "Trust and Antitrust", (1986) 96(2) *Ethics* 231-260, at 241.

the very young and the elderly, other relationships and their moral potential is arguably a better fit.

Finally, I do not doubt that there might be systematic problems in Polish healthcare that hinder women from seeking legal abortions, but I do doubt whether these problems can be amended by structuring patient-doctor relationships into a more adversarial model.

2.4. Conclusion

The present chapter questioned whether individual autonomy provides a promising model in which to guide behaviour in interpersonal relationships. For that purpose I (a) teased out the image of the person as presented in the ECtHR autonomy-related case law and (b) analysed the way the Court conceptualises relationships between autonomous persons.

The analysis showed that claims involving personal life choices, in the form of someone being able to live their life in the manner of their choosing, signify the emergence of a certain kind of autonomous action: a consciously assertive, self-determining person exercising a high degree of creative autonomy by way of his or her claims to rights in personal relationships. In the opinion of the present writer, the inclination to interpret Article 8 rights in the light of a person's wish to live the life of their own choosing should be treated with utmost care and critical attention.

The appeal to individual autonomy is sometimes hard to resist. However, as I argued in this chapter, adopting individual autonomy for regulating certain relationships might not only paint a one-sided and impoverished picture of a human condition, it also may negatively backfire. By equating autonomy with the illusion of autonomous action free of dependency we also risk adopting a self-interested atomistic and adversarial outlook detached from others. Individual autonomy may reinforce the tendency to think of ourselves as separate and in conflict with others. Absent a sense

and recognition of care, individual autonomy appears to lend itself to a “cold unfeeling vision of moral judgment and behaviour.”¹¹⁶

In other words, thinking in terms of independence and self-sufficiency may blind us to the extent of our reliance upon others. As we regard ourselves more and more as self-constituted individuals, we may fail to realise how we depend upon each other not only in early childhood, in old age or in cases of illness, but in multiple situations and formations. In order to further demystify the image of the self-sufficient and independent individual, I will turn now to sociological literature on individualisation.

¹¹⁶ J. Spring, “On the Rescuing of Rights in Feminist Ethics: A Critical Assessment of Virginia Held’s Transformative Strategy”, (2011) 3(1) *Praxis* 66-83, at 72.

CHAPTER 3

AUTONOMY, INDIVIDUALISATION AND THE EMERGENCE OF TRUST

3.1. Introduction

In the previous chapter I maintained that the perception of “individualistic” autonomy favoured by the European Court of Human Rights fosters an impoverished image of individuals and realigns interpersonal relationships in ways that are potentially problematic for the quality of relationships in our personal lives.

However, these findings aside, I have to remind myself that most of the expanding ramifications of autonomy rights have been welcomed by policy makers, people in general and legal commentators. The notion of individual autonomy is still widely perceived as one of the positive aspects of modern society, based as it is on the notion of the emancipation of the individual.¹ The commentators stress that advances in areas of science, technology and economics, coupled with increasing social and judicial emphases on individual autonomy, positively demand now that people have greater input into medical decision-making and control over life and death decisions.² Reasons and reactions like these make me cautiously hesitant to make any early conclusions about individual autonomy, as conceived by the ECtHR, being morally deficient and socially dangerous. The inquiry about the purpose of the concept of autonomy under the ECtHR jurisprudence should proceed.

As it is, this chapter is a continuation of the assessment of the normative implications of autonomy’s inclusion and its interpretation under the Article 8 of the ECHR in the context of human relationships. Whereas the previous chapter gave an account of

¹ B. de Vries, L. Francot, “Information, Decision and Self-Determination: Euthanasia as a Case Study, (2009) 6(3) *SCRIPTed* 558-574, at 559; T.M. Franck, *The Empowered Self: Law and Society in the Age of Individualism*, OUP, 1999.

² H. Biggs, “A Pretty Fine Line: Life, Death, Autonomy and Letting It B”, (2003) 11 *Feminist Legal Studies* 291-301, at 299; See also Chapter 1 Section 1.3.1.

autonomy in the light of the current practice of the European Court of Human Rights, it did not provide any explanations as to why the inclusion of the concept of autonomy was actually needed under Article 8 jurisprudence. What might explain autonomy's manifestation in the Human Rights Court's jurisprudence? How might we account for the increasing involvement of the ECtHR in a number of issues and problems, which had they arisen in the past, would have been discussed and resolved within the province of family circle or medical practice without ECtHR interference? Despite autonomy's central position in moral and political philosophy ever since Emmanuel Kant "invented the conception of morality as autonomy,"³ and despite its extensive use in debates over various legal freedoms and rights and biomedical issues, the concept was "called into existence" under the ECtHR practice only as recently as at the very beginning of the twenty-first century. What purpose did the introduction of the concept and the particular interpretation given to it serve at the beginning of the twenty-first century in cases pertaining to family life, birth, health and dying? Why has autonomy become such a dominant feature in our lives? What might be the conditions responsible for the growth of autonomy-related case law? In order to provide answers to these questions, I propose to consider the jurisprudential developments discussed in the two previous chapters in the light of diverse and intertwined processes of social and cultural change. Answering these questions will arguably give a better understanding about the harms and detriments that autonomy rights are to protect under the human rights system and thereupon evaluate the concept's suitability for the task.

For these purposes I will take a step back and explore the possible reasons and underlying objectives for the involvement of autonomy in Article 8 case law and the particular reading given to this notion by the Strasbourg Court within a wider explanatory framework. What I propose is a reconsideration of autonomy under the European Convention on Human Rights system from the vantage point of the newest transformations and developments in the forms of social order and life in contemporary Western societies. Understanding the types of social and cultural transformations against which autonomy-related human rights law operates gives us

³ J.B. Schneewind, *The Invention of Autonomy*, CUP, 1998, at 3.

arguably a new perspective about the meaning of the concept, and its current meaning's repercussions for individuals and the relationships they are engaged in. To that end, the concept of autonomy as developed under the ECHR system will be set into the context of "individualisation" – an influential characterisation of contemporary Western society, promulgated in particular by Zygmunt Bauman,⁴ Ulrich Beck⁵ and Elisabeth Beck-Gernsheim.⁶ In other words, I now wish to consider the wider context of an "individualistic" conceptualisation of autonomy and what such an approach means, or might mean, by reference to literature and commentary on the notion of "individualism".

Drawing from the works of Beck, Beck-Gernsheim, Bauman and Anthony Giddens, among others, this chapter argues that autonomy-based case law originates from the growth of insecurities, lack of orientation and authority inflicted on individuals as a result of three interconnected dimensions of individualisation processes: (a) loss of traditional – "removal from historically prescribed social forms and commitments in the sense of traditional contexts of dominance and support (the liberating dimension);"⁷ (b) expansion of choice; and (c) institutional demands and expectation to lead a "life of one's own." As a result of these processes the individual is liberated from "natural" constraints, from norms set by tradition, custom, religion, yet at the same time new demands and controls are set by the labour market, legal regulations and social media that compel individuals to arrange their lives in accordance with the ideal and model of self-realisation. The erosion of the norms set by "tradition", and the task of self-identification creates "sharply disruptive side-effects"⁸ of feelings of isolation, anguish and insecurity – consequences critically overlooked by the Human Rights Court, and indeed driven by the approach adopted by the Court.

Looked at it in this way it will be argued that autonomy rights and their individualistic normative language is a double-edged sword – one that promotes the realisation of self-fulfilment as well as the cultivation of self-limitation. On the one

⁴ Z. Bauman, *Liquid Modernity*, Polity Press, 2000.

⁵ U. Beck, *Risk Society*, SAGE Publications, 1992; U. Beck, E. Beck-Gernsheim, *Individualization*, SAGE Publications Ltd, 2002.

⁶ U. Beck, E. Beck-Gernsheim, note 5 above.

⁷ U. Beck, note 5 above, at 128.

⁸ Z. Bauman, note 4 above, at 90.

hand, the trend is towards personal freedom, independence, human empowerment, while on the other hand this happens at the cost of social alienation, growing insecurity and distrust towards others.

The legal image of an independent human self assumes that individuals alone can master the whole of their lives. This approach, arguably adopted by the Court, however, ignores the fact that in modern individualised societies people are increasingly tied to each other. We are therefore also always dependent on others for the possibility of autonomy. This means that one has to be socially sensitive and to be able to relate to others and to obligate oneself, in order to manage and organise the complexities of everyday life. Our interdependence entails that trust becomes an increasingly significant factor to organise human interaction. This, in turn, means that there are attendant obligations between individuals to be sensitive towards, and care for, each other.

By the end of this chapter the reader will understand that dealing with the growth of uncertainties that become increasingly prevalent under the conditions of modern social changes and finding the balance between individualism and our mutual dependencies requires an enlarged pool of trust. In other words, an effective exercise of one's autonomy becomes necessarily dependent on the existence of caring and trusting relationships. In Chapter 4 I consider the importance of trust for human relations in highly individualised societies and analyse individual autonomy's capacity to establish and foster trust-promoting practices. The inclusion of individual autonomy by the Human Rights Court as a substitute response to these concerns is considered inadequate. Chapter 5 proposes thereafter the adoption of caring autonomy as a more fruitful way to guide people's lives.

The chapter proceeds in the following way. I start by examining the concept of individualisation as put forward by contemporary leading sociologists. I differentiate between positive and negative sides of individualisation and claim that while the Court has embraced its liberating moment, it has failed to see the feelings of insecurity, fear and mistrust the "liberation" imposes on individuals. Based on the example of the historical development of the family life and the institution of marriage, I, thereafter, argue that people turn to the Human Rights Court to find new

securities against the backdrop of uncertainties they face in their private lives. Paradoxically, however, the Court's solution to empower them with more individual autonomy arguably only complicates the problem. The final section of the chapter considers why trust becomes increasingly important in managing the complexities of everyday life.

3.2. Individual autonomy as the normative response to the processes of individualisation

3.2.1 Autonomy as the positive aspect of individualisation

The characterisation of contemporary Western society is often associated with the term “individualisation.”⁹ At its core, individualisation signifies diverse and intertwined processes of social and cultural change that have taken place in Western societies during the past forty-fifty years, and which increasingly set individuals at the centre of social fabric and their own life-planning.¹⁰

Detraditionalisation – or the undermining of traditions – is one of the key words most often related to this social phenomenon.¹¹ It entails the understanding that modern Western societies are undergoing a decline of the belief in pre-given or the natural order of things, calling individual subjects to exercise authority and choice over matters that previously belonged to the terrain of tradition and fate.¹² Whereas within the tradition, identities are inscribed rather than open for autonomous decision-making, “detraditionalisation entails that people have acquired the opportunity to

⁹ This term associates most closely with the works of Ulrich Beck, Elisabeth Beck-Gernsheim, Zygmunt Bauman and Anthony Giddens, but it is now also widely used by other scholars writing in the field of sociology and elsewhere. See e.g. A. Elliott, C. Lemert, *The New Individualism*, Routledge, Revised ed, 2009; A. Honneth, “Organized Self-Realization: Some Paradoxes of Individualization”, (2004) 7(4) *European Journal of Social Theory* 463-478; A.K. Jain et al., “Facing Another Modernity: Individualization and Post-Traditional Ligatures”, (2002) 10(1) *European Review* 131-157.

¹⁰ U. Beck, E. Beck-Gernsheim, note 5 above; U. Beck, note 5 above; Z. Bauman, note 4 above; A. Elliott, C. Lemert, note 9 above; A. Honneth, note 9 above.

¹¹ P. Heelas et al (eds), *Detraditionalization: Critical Reflections on Authority and Identity*, Blackwell, 1996; A. Giddens, *Runaway World*, BBC Reith Lectures, available at http://downloads.bbc.co.uk/rmhttp/radio4/transcripts/1999_reith4.pdf; A. Elliott, C. Lemert, note 9 above, at 7-8; U. Beck, E. Beck-Gernsheim, note 5 above, at 1-21.

¹² P. Heelas, “Introduction: Detraditionalization and Its Rivals” in P. Heelas et al (eds), *Detraditionalization*, Blackwell, 1996, 1-20, at 2; A. Giddens, “Risk and Responsibility”, (1999) 62(1) *Modern Law Review* 1-10, at 3.

stand back from, critically reflect upon, and lose their faith in what the traditional has to offer.”¹³ In other words, categories such as family, marriage, religion and morality used to give people’s identities pre-given meanings and left little room for individual autonomy. By contrast, in many contemporary Western societies, the construction of one’s identity becomes detached from traditional life models. With the disintegration of what Zygmunt Bauman calls “solids” – “bonds which interlock individual choices in collective projects and actions”¹⁴ – individuals become free to construct their own ends and goals, their own identities and life projects. As a consequence – life, death, gender, identity, religion, marriage, parenthood, social ties – all are becoming decidable. Choice becomes the means by which individuals define themselves and assert their autonomy. In a word, individualisation liberates people from traditional roles and constraints, and as a consequence, the range of personal choice and opportunity expands and the possibilities of greater freedom of action open up.¹⁵

In Chapter 1, I briefly touched upon some of the considerations that have made this process of breaking from the traditional possible and how these developments have influenced the practice of the Human Rights Court. I claimed that, arguably, one of the reasons the Court adopted the concept of individual autonomy under its Article 8 case law was precisely because of the concept’s heightened recognition under the conditions of social change. I pointed out that by adopting the individual autonomy perspective in cases pertaining to transsexuals, assisted suicide and assisted reproduction, the Court arguably took into consideration the way several advancements in medicine and technology have now undermined the credibility of what was previously homogeneous and therefore unquestioned. Out of these developments, reproduction or one’s sex cannot be perceived anymore so much as a matter of fate, but as a matter of choice.¹⁶

According to Giddens’ terms, what we are witnessing is the “end of nature” – a world in which few aspects of physical nature remain untouched by human

¹³ P. Heelas, “On Things Not Being Worse, and the Ethic of Humanity”, in P. Heelas et al (eds), *Detraditionalization*, Blackwell, 1996, 200-222, at 211; See also A. Elliott, C. Lemert, note 9 above, at 12-13.

¹⁴ Z. Bauman, note 4 above, at 25.

¹⁵ It is another question, of course, for how many this “freedom” is in reality attainable.

¹⁶ See Chapter 1, Section 1.3.1.1.

intervention – and “end of tradition” – a world where life is no longer lived as fate.¹⁷ As nature and tradition release their hold, there is a reorientation of values.¹⁸ The principle of sanctity of life, for example, becomes more widely recognised as a subjective preference, as it has lost its once unscrutinised position. In this light, it is worth stating again what was said in the *Pretty* case:

In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.¹⁹

There is a clear sign of recognition by the Human Rights Court of the subjectivity of experiences and values, of a move from pre-given to individual control. This is because autonomy becomes more cherished as more traditional identifications recede.

The developments in medicine and technology are of course not the only reasons behind the demise of the traditional and the traditional ways of living and their consequent accommodation by the law. Sociological literature identifies several other material, social, cultural and intellectual processes of change that have been seen as contributing to the devaluation of the external authority to create a “new kind of individualism”²⁰ that increasingly encourages the expansion of the ethic of individual self-fulfilment and achievement in Western modern societies.²¹ For example, Giddens stresses the role of globalisation and the expansion of communication systems that have put tradition under strain in a large part of the world and changed fundamentally the nature of people’s lives, including one’s day-to-day family life. His argument goes that when components from different cultures become more and more available, the given social and cultural realm becomes more pluralistic. Societies come to contain diverse and fragmented range of beliefs and

¹⁷ A. Giddens, note 12 above, at 3.

¹⁸ Ibid., at 7.

¹⁹ *Pretty v the United Kingdom*, para 65.

²⁰ A. Honneth, note 9 above, at 468.

²¹ U. Beck, E. Beck-Gernheim, note 5 above, at 22.

values. Faced with diversity, he suggests, people lose faith in what has been traditionally sustained within a closed environment.²²

In a similar vein, Heelas, Bauman and Elliott and Lemert argue that the market technologies of capitalism, and the mass consumer culture it produces, trivialises the culture and tradition so that it loses much of its ethically and aesthetically demanding qualities.²³ There is less to have faith in, less to challenge self-interest. Organised culture used to serve as moral and aesthetic authority to differentiate between values, to distinguish between what is important and what is not, and to facilitate coherent, purposeful identities or life-plans. The fact that culture has become increasingly disorganised and weakened, it can be argued, means that people have to turn to their own resources to decide what they value, to organise their priorities and to make sense of their lives. That is to say that

The weakening of traditional bonds to cultural values, social positions, religion, marriage and so on, means that people find themselves in the position where they have to select from those packaged options or styles to which the cultural realm has been reduced in order to construct their own ways of life.²⁴

Honneth, additionally, points out the role of increased educational opportunities, the growth of income and leisure time, the expansion of the service sector, etc., that all, each in its own way, have diversified the ways open to individuals and expanded the options for individual self-discovery and self-reflection.²⁵

I will not be able nor is it my purpose to give here anything even close to a comprehensive overview of the multiple processes of social change that have taken place in Western societies over the past decades. The point to be made here is that as a result of reciprocal reinforcement of diverse dynamics of social development, many norms in people's lives have been loosened, permitting individuals to have greater levels of choice of how to lead their lives, and consequently bringing the sense of autonomy strongly to people's awareness and to their value system. It can be argued

²² A. Giddens, note 11 above.

²³ A. Elliott, C. Lemert, note 9 above, at 38; Z. Bauman, *Does Ethics Have a Chance in a World of Consumers?*, Harvard University Press, 2008.

²⁴ P. Heelas, note 12 above, at 5.

²⁵ A. Honneth, note 9 above, at 468-470.

that this is a positive, enabling and emancipating side of the phenomenon of individualisation. This aspect of individualisation can be said to be power conferring: it enables individuals to live without the restraints of norms set by tradition or morality and provides the individual with an opportunity to determine the nature and the parameters of their own lives.

Concurrently, and importantly, these tendencies fit well with the value given to autonomous agent within the ideology of liberal ethics. In these terms individualisation corresponds to the liberal view that values are, largely, a matter of individual choice rather than being pre-determined. To respect one's autonomy is to respect each person's interest in living her life in accordance with her own conception of the good. Going from there, it can be argued that the prising of the authority of the individual has been, consequently, translated into human rights law so that people can better cultivate their capacities for autonomous choice and decision-making. In other words, human rights law has moved to accommodate this new interest of persons who take charge of determining who they are.²⁶ Individualisation has positively opened up wide ranges of possibilities in the quality of people's lives, and one can argue that this should be equally recognised (by the adoption of the value of individual autonomy under the ECHR) as well as be encouraged (by having autonomy as a justiciable right to choose how to lead one's life) by the Human Rights Court.

3.2.2 Autonomy as the negative aspect of individualisation

Although there are clear benefits resulting from the processes of individualisation, which have influenced the ECtHR case law, there is a flipside to this social phenomenon. Beck et al. argue that the very same dynamic that liberates the individual to construct her or his own ends and goals, identities and life projects,

²⁶ The growing consciousness of individual worth and its manifestation in the claim to individual autonomy has been noted, for example, also in the context of citizenship laws. As a result of the new individualism, more and more states are moving in the direction of permitting individuals to exercise greater degree of personal autonomy in designing their identity. See T.M. Franck, note 1 above, ch 4.

generates for the individual the conditions of omnipresent and ever-changing risk.²⁷ Liberation from restraints, the expansion of choice and possibilities for self-realisation might be valuable, but they also have its perils. Alongside the disintegration of historically prescribed social forms and commitments (the liberating aspect of individualisation), individualisation simultaneously entails the disintegration of old forms of certainties and support.

When the rules governing custom, etiquette, or morality retreat, the individual himself becomes the rule finder. Moreover, as the sociologists argue, the liberated and emancipated individual becomes responsible for finding and inventing new certainties for himself.²⁸ Under the conditions of individualisation, the individual is not only *able* to make choices in an ever expanding range of situations, but the individual is also *compelled* to do so.²⁹ With the disintegration of support networks such as family, for example, the individual has to start to rely on his or her own ingenuity to develop personal support networks. Similarly, the economic security provided by the nuclear family is replaced by individual responsibility and is subject to the vagaries of employment prospects. The individual himself must become the agent of his or her own identity making and livelihood, and simultaneously become responsible for how well he or she performs this task. For example, it is not the fault of the authorities for an inability of an individual to secure employment, but

[i]f they stay unemployed it is because they failed to learn the skills of gaining an interview, or because they did not try hard enough to find a job; if they are not sure about their career prospects and agonise about their future, it is because they are not good enough at winning friends and influencing people and failed to learn and master, as they should have done, the arts of self-expression and impressing others.³⁰

²⁷ U. Beck, "The Reinvention of Politics: Towards a Theory of Reflexive Modernization" in U. Beck et al (eds) *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order*, Polity Press, 1994, 1-55, at 7. See also U. Beck, note 5 above; A. Giddens, note 11 above.

²⁸ U. Beck, note 27 above, at 14.

²⁹ U. Beck, E. Beck-Gernsheim, "Individualization and 'Precarious Freedoms': Perspectives and Controversies of a Subject-Oriented Sociology", in P. Heelas et al (eds), *Detraditionalization*, Blackwell, 1996, 23-48, at 27; Z. Bauman, note 4 above, at 31-32. According to Bauman, individualisation consists of "transforming human 'identity' from a 'given' into a 'task' and charging the actors with the responsibility for performing that task and for the consequences of their performance."

³⁰ Z. Bauman, note 4 above, at 34.

Alongside Bauman, a number of scholars, therefore, argue that the claim to autonomy and self-realisation has been increasingly made into something of an institutional demand – an expectation set by media, capitalist economy and legal regulations, demanding that individuals present themselves as being flexible, active, inventive, resourceful and willing to develop themselves if they wished to achieve success in their profession or in society.³¹ “What is demanded is a vigorous model of action in everyday life, which puts the ego at its centre.”³² “‘Responsibility’ means now, first and last, responsibility to oneself, while ‘responsible choices’ are, first and last, those moves which will serve the interests and satisfy the desire of the actor.”³³ “To individualism corresponds the liberal virtue of independence – the disposition to care for, and take responsibility for oneself and avoid becoming needlessly dependent on others.”³⁴

This goes to the core of my argument for this chapter. It is not only the benefits of individualisation that have influenced the inclusion of autonomy into ECtHR case law, but – let us call it – the negative side of individualisation is equally influential in forming the background against the new developing body of Article 8 case law. My argument is threefold:

First, because of the liberation of rules and roles governing interpersonal relationships, the behaviour of the parties to these relationships has become less predictable and indeterminate. As autonomy grows, it becomes difficult to anticipate the behaviour of other people.

Second, institutional demands call upon individuals to live “a life of one’s own”, to be the master of their own identity and livelihood. To take responsibility for that, arguably places the duty for oneself – to have one’s own interests first and foremost at heart – at the centre of one’s priorities. As a consequence, it makes it harder to count on others to act in our interest.

³¹ A. Honneth, note 9 above, at 472; A. Elliott, C. Lemert, note 9 above, at 13 and 53; U. Beck, E. Beck-Gernsheim, note 5 above, at 23-24; Z. Bauman, *The Art of Life*, Polity Press, 2008, at 89-90.

³² U. Beck, note 5 above, at 136.

³³ Z. Bauman, note 31 above, at 107.

³⁴ W. Galston, *Liberal Purposes*, OUP, 1991, at 222, cited from I.M. Young, “Mothers, Citizenship and Independence: A Critique of Pure Family Values”, (1995) 105(3) *Ethics* 535-556, at 543.

Third, as a result of these developments – when the securities provided by “tradition” disappear and the demands on self-sufficiency and autonomy grow – the individual is faced with a growing set of anxieties, risks and insecurities.

Under these circumstances people turn to find new sources for “universal cravings for certainty, predictability, order and the like.”³⁵ Thus, the increasing litigiousness to the ECtHR can be seen as a way to find this security. The right to respect for one’s autonomy acts in this context as a protective mechanism against others’ indeterminate and presumably malign behaviour.

As the second half of this chapter argues, the concept of individual autonomy, rather than providing a solution to the problem, exacerbates the problem. As the range of social interaction and interdependence on one another grows, trust and cooperation become increasingly relevant.

3.3. Shifting foundations of interpersonal relationships and their consequences for individuals

In order to support my argument that the ECtHR Article 8 autonomy-related case law originates from the growth of insecurities, mistrust, lack of orientation and authority inflicted on individuals as a result of individualisation processes, I visit the historical developments of family life and marriage. The historical perspective arguably gives a better viewpoint about what is new about autonomy claims pertaining to family life and marriage, and what the Court arguably is missing in how it addresses them.

3.3.1 Changes in family life and marriage

Looking at the history of sexuality and family life it is possible to distinguish three different stages.³⁶ First, the traditional family in pre-modern times was essentially an economic unit. It was a network of dependence, defined by the material needs of one’s family, farm and village. What counted was not the individual person, but

³⁵ P. Sztompka, *Trust: A Sociological Theory*, CUP, 1999, at 115.

³⁶ The narrative presented here is based on the Beck’s, Beck-Gernsheim’s and Giddens’ account on the social history of marriage. See U.Beck, E. Beck-Gernsheim, note 5 above; A. Giddens, note 11 above.

common goals and purposes. The institution of marriage prescribed men and women what they were to do and not to do even in the details of daily life, work and sexuality. The tightly knit communities of family and community presented omnipresent possibilities of control. Anyone who infringed on the prevailing norms was possibly subject to rigorous sanctions. The basis of marriage was not sexual love, nor the place where such love could flourish, but instead was founded on the premise of religious obligation and transmission of property.

The second stage in the history of family came with the age of industrialisation. The family lost its function as a working unit and the idea of romantic love as the basis of marriage replaced marriage as an economic contract. This did not mean, however, that the principle of individual freedom of the spouses dominated the institution. The dissolution of the material basis of the marriage was replaced by heightened moral and legal underpinnings stemming largely from the values of “Christian world order.” In addition to that, a new form of dependence asserted itself between husband and wife within the new framework of labour: the husband was financially responsible for the family livelihood, while the wife was defined as the “heart of the family” responsible for “relationship work” – not only for domestic tasks and child care, but also for the maintenance of a climate of security and contentment. Within this framework of relations the woman became dependent on the man’s earnings, while he needed her everyday labour and care to be capable of functioning in the workplace. Hence, the obligation of solidarity, that had characterised the pre-industrial family, went on to exist in a modified form.

Fundamental changes in the interpretation of marriage and family from something “beyond the individual to the exclusively individual interpretation”³⁷ began roughly in the second half of the twentieth century. Improved educational opportunities for women and increased employment of women outside the home, among others, led to a third type of family life. In this case marriage is primarily a source of emotional support, a tie between two equal persons who each earns their own living and seeks in their partner mainly the fulfilment of inner needs. Marriage is increasingly seen as

³⁷ U. Beck, E. Beck-Gernsheim, note 5 above, at 11.

being free of objective goals and being geared to subjective expectations; it becomes flexible and open to the interpretation of those who are married. “Good” marriage means primarily personal happiness – the central focus is on the individual person, her or his own desires, needs, ideas and plans. As such, it may be modified in any way, including dissolution, which increases the satisfaction of one or both individuals. In other words, marriage and other domestic arrangements are now represented and regulated not as matters of obligation and conformity to a moral norm, but as lifestyle decisions made by autonomous individuals seeking to fulfil themselves and gain personal happiness.³⁸

Although, the “traditional” family has by no means disappeared, the crucial change is that even traditional conditions of life have to be chosen, defended and justified against other options.³⁹ The individual has to decide on his or her course of action from a great variety of options, which are all within the realms what is socially acceptable. As a result, “no one now can say what goes on behind the oh-so-unchanging label “marriage” – what is possible, permitted, required, taboo or indispensable”.⁴⁰

The erosion or weakening of certain norms of traditional family life has its advantages. Many of the weakened norms were not good norms. They often suppressed women, as well as children, leaving no room for autonomous action or the ability to choose one’s own ways in life. These developments opened up new scope for action and decision and new opportunities for individuals, and were welcomed by many, and rightly so. I put the value autonomy has for individuals under no doubt.

My point here is, however, that traditional societies and family forms entailed rules that made people’s behaviour predictable. Two or three generations ago, when two people got married, by and large, they knew what it was they were doing and what to expect from each other. Marriage, largely fixed by tradition and custom was akin to a state of nature. When rules disappear or weaken, it becomes so much more difficult

³⁸ N. Rose, *Powers of Freedom*, CUP, 1999, at 86. See also J.B. Singer, “Privatization of Family Law”, (1992) *Wisconsin Law Review* 1443-1567.

³⁹ U. Beck, E. Beck-Gernsheim, note 5 above, at 27.

⁴⁰ *Ibid.*, at 11.

to predict anyone's behaviour.⁴¹ With the erosion of rules, reliable orientation points and trustworthy guides on other's behaviour become much scarcer, and the "pre-existing ways of doing things become less secure, less taken for granted."⁴² Similarly, the more options that are available to people, the less predictable are the decisions they will eventually take. In other words, the larger the feasible set of alternatives that is open to others, the more uncertain it becomes what actions the others will take.

Hence, suddenly everything becomes uncertain, including the ways of living together – who does what, how and where – or the views of sexuality and love and their connection to marriage and the family.⁴³ Marriage today, against the backdrop of soaring rates of divorce in Western countries, has transformed into a kind of temporary arrangement, something that can be easily discarded. The likelihood of divorce must now be "factored in" by anyone that contemplates getting married.⁴⁴

Furthermore, with self-development at the heart of personal projects, when individuals are encouraged to elaborate on their inner worlds and to follow their true nature, the more suspicious people are over whether others will remain loyal, dependable and trustworthy to them. The demand and pressure to have a "life of one's own" potentially undercuts the sense of duty to other people and thus corrodes our conviction that we can depend on others to act in our interest even when it conflicts with theirs. It can be argued that "following one's true nature" obliges us to constantly evolve and to keep our options open, and not to limit ourselves with a permanent relationship or activity. As Bauman put it:

There is always a suspicion – even if it is put to sleep and dormant for a time – that one is living a lie or a mistake; that something crucially important has been overlooked, missed, neglected, left untried and unexplored; that a vital obligation to one's own authentic self has not been met, or that some chances of unknown happiness completely different from any happiness experienced before have not been taken up

⁴¹ C. Schneider, "Family Life in the Age of Distrust", (1999) 33(3) *Family Law Quarterly* 447-460, at 450.

⁴² A. Elliott, C. Lemert, note 9 above, at 8.

⁴³ U. Beck, note 5 above, at 109.

⁴⁴ A. Elliott, C. Lemert, note 9 above, at 8.

in time and are bound to be lost forever if they continue to be neglected.⁴⁵

In summary, interpersonal relationships have, arguably, become today filled with fears, anxieties and insecurities about the behaviour of other parties of a relationship. Others' actions become less predictable and risky. Also, because of growing institutional and cultural demands for self-realisation and self-development, there might be less reason for people to believe that others behave solicitously and with their best interests in mind. So how do these developments reflect in the practice of the Human Rights Court?

3.3.2 Autonomy claims – dealing with uncertainty

It is inevitable that in such situations people start thinking in terms of risk and in terms of finding new securities against these risks. In order to make one's livelihood or to fulfil one's goals in life, the increasing unpredictability and indeterminacy of personal matters needs to be filled with alternative arrangements providing similar functions and meeting universal needs for certainty, predictability, order and the like.⁴⁶

Against the background of growing uncertainty and mistrust towards others' behaviour, we can consider why some of the cases discussed in the previous chapter landed on the work desks of the judges of the Strasbourg court, and can review how the Court has responded to these concerns.

3.3.2.1 Reproduction and tensions in autonomy

In the previous chapter, I dealt with several cases pertaining to assisted reproduction,⁴⁷ and in light of the previous section on family life, I begin this section by asking: why has respect for a decision to become a parent emerged as a human right?

⁴⁵ Z. Bauman, note 4 above, at 55.

⁴⁶ P. Sztompka, note 35 above, at 115.

⁴⁷ See Case of *Evans v the United Kingdom* (App.6339/05), Judgment of 10 April 2007; Case of *Dickson v the United Kingdom* (App.44362/04), Judgment of 4 December 2007; Case of *S. H. v Austria* (App.57813/00), Judgment of 3 November 2011.

As discussed in Chapter 2, the generally understood underlying rationale behind these rights claims is “the shared conviction that our sense of being the author of own actions, especially when they pertain to something as personal as reproduction, is profoundly valuable to us.”⁴⁸ Control over whether to reproduce or not to reproduce is considered important because it is central to personal identity and “to the meaning of one’s life.”⁴⁹ In this sense, it can be argued, reproduction is part of the ethos of individual self-realisation and self-fulfilment, characteristic to our time.⁵⁰ Reproduction is one of the elements, alongside career choices, the discovery of new talents or hobbies – to give some of the examples used by Priaulx – that make up the notion of “who one is.”⁵¹

There may be, of course, different reasons for having a child, but in the light of the discussion presented earlier in this chapter, I want to propose a different reading of the cases underlying the claims for one’s right to respect to become a parent.

Drawing from the discussion above, it could be argued that alongside with the fragmentation and disintegration of the traditional family, a child is becoming increasingly important in terms of one’s needs for companionship, affection and belonging. When traditional family structures become frail, e.g. because of divorces, break-ups, numerous changes of partners, and being single (all are common ways of life), “a child may be still ‘a bridge’ to something more durable.”⁵² As marital ties come apart, or fail to form in the first place, other ties become more important to secure oneself against the risks of loneliness, companionship or having somebody to take care of oneself in old age. As Beck elaborates:

The child is the source of the last remaining, irrevocable, unexchangeable primary relationship. Partners come and go. The child stays. Everything that is desired, but not realisable in the relationship, is directed to the

⁴⁸ N. Priaulx, “Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters”, (2008) 16 *Medical Law Review* 169-200, at 175.

⁴⁹ J.A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies*, Princeton University Press, 1994, at 24.

⁵⁰ See Section 3.2.2. above.

⁵¹ N. Priaulx, note 48 above, at 176.

⁵² Z. Bauman, *Liquid Love*, Polity Press, 2003, at 41.

child. With the increasing fragility of the relationships between sexes the child acquires the monopoly on practical companionship.⁵³

New forms of family life include living alone, non-marital co-habitation, childless marriage or serial marriage or “living apart together” with partners in separate dwellings. These alternative ways of living may offer many advantages by releasing individuals from the confines of the old-style family and creating new options and free spaces. But it is not clear how these new forms will affect, for example, old age survival. For couples without children, the turning point may come when one of the partners dies and the other is left alone. What are the options beyond traditional family for care? In these ways people want to secure themselves against risks.⁵⁴ Naturally, it is not a risk-free “investment,” nothing guarantees that your child, after the age of 18 or so, will provide you the comfort you perhaps expected for. Nevertheless, the genetic links, at least, some way or another, connect you with this person.

Based on an empirical research done in early 1990s in the United States of America, Susan Alexander argued that since children have become enormously valuable for their parents for the companionship they provide, the courts should recognise their importance and allow compensation for damage for the loss of the bond between the child and its parents.⁵⁵ Drawing on different surveys and scholarly work, she claimed that although in late twentieth-century America people are having fewer children (one of the reasons being women choosing to remain in the workplace after marriage or after the birth of a child), at the same time, parents are putting increasing value on each child they produce or try to produce.⁵⁶ She, further, maintains that although children take a lot of time and money, and many parents struggle with their upbringing, for most families each child who is born to the family is of great value. The main reason for this, Alexander argues, is that “most of the parents hope that once a child is born they enjoy the companionship of their child in a normal, happy relationship, and that the bond they create with this child remains strong throughout

⁵³ U. Beck, note 5 above, at 118.

⁵⁴ U. Beck, E. Beck-Gernsheim, note 5 above, at 130-131.

⁵⁵ S.J.G. Alexander, “A Fairer Hand: Why Courts Must Recognize the Value of a Child’s Companionship”, (1991) 8 *T.M. Cooley Law Review* 273-359.

⁵⁶ S.J.G. Alexander, note 55 above, at 274.

their lifetime.”⁵⁷ She cites a perspective of one of the participants of a nationwide survey that inquired about women’s feelings on motherhood:

After seeing many friends in my age group growing older without family and their partners dying, I think it must be a lonely life for them without children. Imagine being sixty-seven with no children – no thank you! Leaning on them in my old age gives me security.⁵⁸

Referring to the social changes the American society has undergone in recent decades, Alexander notes that the bonds of marriage or partnership are no longer viewed as necessarily lasting ones. As a result, other bonds have taken their place, and one of the most important ones among these bonds is that between a parent and a child.⁵⁹ Even when the couple divorces or separates, the parents’ link to their child remains, “and this link may become the most important bond the divorced parent maintains.”⁶⁰

Although Alexander’s research was based on American data and studies, we have already observed that similar social developments have taken place also in many European countries. There seems to be no reason to think, then, that the Europeans who brought their cases to the ECtHR to fulfil their wish to have a child, might have been motivated by completely different reasons.

Considering also the substantial emotional and physical investment women, and sometimes men, undergo in order to have a child in cases of infertility problems (as to *Evans* and *S.H. and others*) and the lengthy court proceedings they undertake to accomplish the aim of having a child (for the applicants in *S.H. and others* it took 13 years since they lodged an application to the Austrian Constitutional Court for the review of the constitutionality of the Artificial Procreation Act to receive the final judgment from the European Court of Human Rights⁶¹), it all supports the conclusion that couples or individuals who choose to undergo all these difficulties must have a very strong motivation of doing so and must place a very high value on to the child who is the result of that process.

⁵⁷ Ibid.

⁵⁸ Ibid., at 276.

⁵⁹ Ibid., at 340.

⁶⁰ Ibid., at 342.

⁶¹ *S.H. and others v Austria*, para 13.

A wish for companionship, a wish for a child, creates, however, certain tensions in autonomy claims. Paradoxically, a right for respect for a decision to become a parent simultaneously increases and reduces one's independence. On the one hand, there is the wish for independence and the wish to be free from outside interferences in respect for one's choices, including that of an (ex-)partner.⁶² On the other hand, the wish to have a child means that the autonomy of one's own preferences is bound to be compromised:

Having children may mean the need to lower one's professional ambitions, to 'sacrifice a career,' as the people sitting in judgment over professional performance would look askance at any sign of divided loyalty. Most painfully, having children means accepting such loyalty-dividing dependence for an indefinite time.⁶³

We claim the right for autonomy, yet what we aim for is a relationship of dependence. A relation of dependency, that calls for responsibility to care for the child.

But there is, yet, another tension in play. We want to be autonomous in our choices, but inevitably we need someone to respond to our needs to have a child. As I maintained in the previous chapter, despite the advances in medical sciences and technologies, reproduction still needs the participation at least of two parties of opposite sex. This particular tension between one's wish to have a child and the interdependence of that wish becomes clear when we think back to the *Evans* case about the dispute over frozen embryos after the breakdown of the relationship between Ms Evans and her former partner.

At the time the *Evans* case was pending in the Human Rights Court, the use of medical technologies for assisted procreation was regulated in the United Kingdom by the Human Fertilisation and Embryology Act 1990. On the one hand, the 1990 Act offered possibilities for those infertile couples or individuals who could not conceive by natural means to have a chance to fulfil their wish to have a child. In the light of the discussion provided above, the 1990 Act provided some relief against the insecurities that accompany modern intimate relationships. It provided infertile

⁶² As in e.g. *Evans v the United Kingdom*.

⁶³ Z. Bauman, note 52 above, at 43.

couples and particular individuals some security in that whatever happens to their marriage or relationship, they will not be lonely or without companionship in the future.

On the other hand, the Act was also addressing another kind of fear of the modern individual – that one can become “locked” into a situation which conflicts with their desire to “follow their true nature” or their need to constantly evolve. Following this principle, section 4(1) of Schedule 3 stated: “The terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the gametes or embryo to which the consent is relevant.” Meeting the fears of an “evolving” individual fits nicely also with Judge Wall’s interpretation of the 1990 Act in the High Court judgment:

[a]s a matter of public policy, it had not been open to J to give an unequivocal consent to the use of embryos irrespective of any change of circumstance...in the field of personal relationships, endearments and reassurances of this kind were commonplace, but they did not – and could not – have any permanent, legal effect./.../It is a right which the Statute gives him within the clear scheme operated by Parliament. It was the basis upon which he gave his consent on 10 October 2001.⁶⁴

This particular regulation, ironically, made the other party’s personal situation even more perilous and insecure, since it was the law which gave unlimited “license” to change one’s mind and to withdraw consent for whatever reason at any time until the implantation of the embryos to the uterus. For Ms Evans, the threat written in the law unfortunately materialised. Since the Human Rights Court upheld the United Kingdom regulation, Ms Evans’ chances for the child she wished for were broken.

So in the case of Ms Evans, we can differentiate two aspects of her claim: a wish for a child and to set some boundaries to the autonomy of the person one is dependent on. According to my reading, both of her claims were targeting the same underlying societal issue – how to deal with the autonomy of others and the unpredictability and insecurity it brings. By claiming for her right to respect for the decision to become a

⁶⁴ *Evans v Amicus Healthcare Ltd and others*, [2003] EWHC 2161 (Fam).

parent in a genetic sense,⁶⁵ she was, allegedly, aiming to ease the insecurities what she was going to have with any future partnership. Arguing that her former partner's consent should have become irrevocable from the moment of the creation of the embryos,⁶⁶ she was, again, aiming to reduce the insecurities of modern partnerships.

On a more basic level, what these cases essentially reveal, according to my reading, is that we cannot and do not want to live as lone individuals. Even if we did, it soon becomes evident that for the capacity of autonomy, we need others' involvement, care and consideration. We are always dependent on others for the possibility of autonomy. We are dependent on children because of the emotional – and later on, the financial and material – support they provide. Even if couples – especially women on men – are not so dependent on each other anymore materially, they are still dependent on each other to fulfil the needs of affection and companionship. To push it further, even if a woman decides to have and raise a child completely on her own, she is still, at a minimum, dependent on the will of an anonymous sperm donor not to withdraw his consent. In other words, “an independent life” or “a life of one's own,” is always dependent on the goodwill of partners, colleagues, health care service providers, and others in the surrounding world.

The question that naturally follows now is whether the concept of individual autonomy can deal and respond adequately to the uncertainties associated with modern-day relationships. Considering the outcome of *Evans*, and what was said in the previous chapter – individual autonomy fosters an image of an independent and self-sufficient individual who relates to others on the basis of contractual equality – it is possible to argue that the ECtHR tactic has been to respond to individualisation, and the uncertainty it brings, by trying to make people less dependent on each other. But this, it seems to me, is to confuse the problem with the solution.

The Human Rights Court in *Evans* argued that one of the rationales behind upholding the 1990 Act provisions that allowed both gamete providers to withdraw their consent any time before the implantation of the embryos, was to promote clarity

⁶⁵ *Evans v the United Kingdom*, para 71.

⁶⁶ *Evans v the United Kingdom*, para 62.

and certainty in relations between partners.⁶⁷ It seems to me that instead of providing any certainty, the mechanisms of the law to guarantee individual autonomy exacerbated the sense of uncertainty. Both parties were completely free from any attachments or responsibilities towards each other. Paradoxically, then, upholding the value of free will and independence happens at the cost of growing insecurity and distrust towards others. The realisation of self-fulfilment, ironically, converts to self-limitation. Instead of being sure that you can rely on the promise given by your partner, you have to constantly suspect that he or she might withdraw the promise. Under these conditions, opting for an egg freezing or sperm donor might indeed seem like more “secure” option. However, the “risks” of interdependence never completely disappear.

To conclude this section, my proposition is that, arguably, the ECtHR misunderstood what the autonomy claims meant under the conditions of individualisation; it is not the need for greater individual autonomy *per se*, but the need to be able to depend on others and to gain some more security in life. The right for respect for individual autonomy promises to provide a shield against disappointments when individual expectations in relationships are not being met, but in that way it only exacerbates the problem by making us believe that independence and control can bring one’s wishes and needs to fruition. In reality the fulfilment of most of our aspirations depends on a network of people whose behaviour we cannot control or predict. As I see it, the task before the ECtHR is to provide a framework that accommodates the ascendancy of autonomy to the acknowledgement of human mutuality. The key to this lies, I believe, by bringing the issue of trust in the centre of the discourse of autonomy rights.

3.4. Emergence of the importance of trust

A growing amount of literature pertaining to family law and medical law would say that what we are witnessing behind the quest for more autonomy and independence

⁶⁷ *Evans v the United Kingdom*, para 89.

is the lack or loss of trust in interpersonal relationships.⁶⁸ A growing amount of sociological literature would also say that all these relationships require trust.⁶⁹ Trust is seen as “essential for stable relationships, vital for the maintenance of cooperation, fundamental for any exchange and necessary for even the most routine of everyday interactions.”⁷⁰ “Whatever matters to human beings,” says Bok, “trust is the atmosphere in which it thrives.”⁷¹ Essentially, the value of the existence of trust in these – or any – relationship is that it helps to reduce the anxiety caused by ambiguity and uncertainty of many social situations. Without trust, partnership and marriages, and the goods following from it, would not be possible. I will come back to these points in the next chapter, where I will also explain more thoroughly the relationship between trust and autonomy and the interdependence between these notions. For now, five aspects of the modern-day social conditions that necessitate the engagement of trust as a “regulator” of behaviours will be addressed. The claim is that the increased significance of trust in areas of family life or doctor-patient relationships is related to the changes underlying the family structure,⁷² the shifting foundations in doctor-patient relationships,⁷³ and the ascendancy of autonomy in people’s lives.⁷⁴ Trust becomes more important, because more traditional ways of defining interpersonal relationships are in transition. The Human Rights Court can have an important role for establishing new bases for trust.

First, we have moved from societies based on tradition and fate to those based on human agency and autonomy. Traditional societies do not imply trust. Trust does not arise when tradition dictates each person’s place and how they shall conduct themselves in the hierarchy. The sanction of ancient and eternal routine reduces the

⁶⁸ A.I. Tauber, *Patient Autonomy and the Ethics of Responsibility*, The MIT Press, 2005, at 158; J.J. Chin, “Doctor-Patient Relationship: A Covenant of Trust”, (2001) 42(12) *Singapore Medical Journal* 578-581, at 580; F.H. Miller, “Trusting Doctors: Tricky Business When It Comes to Clinical Research”, (2001) 81 *Boston University Law Review* 423-443, at 423; C.E. Schneider, note 41 above.

⁶⁹ R.C. Solomon, F. Flores, *Building Trust in Business, Politics, Relationships and Life*, OUP, at 11.

⁷⁰ B. Misztal, *Trust in Modern Societies: The Search for the Bases of Social Order*, Polity Press, 1996, at 12.

⁷¹ S. Bok, *Lying: Moral Choice in Public and Private Life*, Vintage Books, 1989, at 31.

⁷² B. Misztal, note 70 above, at 157-158.

⁷³ R.S. Shapiro, et al., “Managed Care: Effects on the Physician-Patient Relationship”, (2000) 9 *Cambridge Quarterly of Healthcare Ethics* 71-81.

⁷⁴ A.B. Seligman, “Role Complexity, Risk, and the Emergence of Trust”, (2001) 81 *Boston University Law Review* 619-634.

preconditions for the salience of trust – uncertainty and contingency – to minimum.⁷⁵ In modern societies more and more depends on individual actors' choices and decisions. The pre-existing ways of doing things become less secure, less pre-determined. With no given set of obligations and opportunities, trust becomes a crucial mechanism on which society depends. Following Luhmann and Seligman, trust is not an obsolete resource typical of traditional society, but just the reverse, it gains in importance with the development of modern social forms, becoming truly indispensable in the present phase of modernity.⁷⁶

Second, ours is a world of increasingly numerous options. In all domains of life the spectrum of potential choices is vast. The more available options people face, the less predictable are the decisions they will eventually take. To choose among alternative courses of actions – ranging from whether to buy this rather than that product to deciding on the ways of reproduction – we often have to resort to trust. The uncertainty about the actions the others will take, when faced with their own pool of multiple choices makes trust an indispensable ingredient of our actions. The larger the feasible set of alternatives that are open to others, the more significant does trust become in formulating our decisions and actions.⁷⁷

Third, the loss of traditional roles and communal ties means that relationships have become optional. Relationships have become, in fact, perhaps the most common and troublesome incarnations of ambivalence.⁷⁸ The dismantling of traditional categories of family, class, social status and gender roles creates the conditions for unknown, elective categories of family, class and gender roles, the meaning of which has to be determined by individual decisions and choices. "We are getting into optional relationships inside families which are very difficult to identify in an objective, empirical way because they are a matter of subjective perspectives and decisions."⁷⁹

⁷⁵ P. Sztompka, note 35 above at 45; See also M. Kohn, *Trust: Self-Interest and the Common Good*, OUP, 2008, at 4-5.

⁷⁶ N. Luhmann, *Trust and Power. Two Works by Niklas Luhmann*, John Wiley & Sons, 1979; A. Seligman, *The Problem of Trust*, Princeton University Press, 1997.

⁷⁷ P. Sztompka, note 35 above, at 13.

⁷⁸ Z. Baumann, note 52 above, at viii.

⁷⁹ U. Beck, E. Beck-Gernsheim, note 5 above, at 204.

Besides the changes in family life, in the modern world the circles of acquaintances and friends are being continually updated. “We are nothing to one another but what we choose to become, and we can unbecome it whenever we want”, say Deresiewicz in his article “Faux Friendship”⁸⁰. Deresiewicz shows how friendship has become the characteristically modern relationship:

Modernity believes in equality, and friendships, unlike traditional relationships, are egalitarian. Modernity believes in individualism. Friendships serve public purpose and exist independent of all other bonds. Modernity believes in choice. Friendships, unlike blood ties, are elective. Modernity believes in self-expression. Friends, because we choose them, give us back an image of ourselves. Modernity believes in freedom, and friendship involves no fixed commitments. The modern temper runs toward unrestricted fluidity and flexibility, the endless play of possibility, and so is perfectly suited to the informal, improvisational nature of friendship. We can be friends with whomever we want, however we want, for as long we want.⁸¹

Coping with all of this raised subjectivity requires an enlarged pool of trust.

Fourth, the expansion of technological achievements, especially in the field of medicine and molecular biology, creates an ever-larger number of unpredictable consequences.⁸² Starting with the invention of the mechanical ventilator to the development of gene technology and engineering, the traditional perceptions of human life, death and illness have had, and continue to have, considerable transformations. The more technology is applied to nature and society, the more life becomes unpredictable. “Increasing social and technological complexity elevates the probability that some key portions of the system cannot be safely counted on.”⁸³ Coping with that raised power and consequent vulnerability calls, again, for the engagement of trust.

Finally, contemporary society is an extremely interdependent society. Under the powers of autonomy and the individualised worldview its current language encourages, our interdependence and interconnectedness on each other becomes increasingly more apparent, and in the end more relevant. Individuals are more and

⁸⁰ W. Deresiewicz, “Faux Friendship”, *The Chronicle Review*, December 6, 2009

⁸¹ Ibid.

⁸² See U. Beck, note 5 above; See also P. Sztompka, note 35 above, at 29-40.

⁸³ P. Sztompka, note 35 above, at 13.

more interdependent upon one another to accomplish their goals. As our dependence on the cooperation of others grows, so does the importance of trust in their reliability. Since human mutuality and community rest no longer on solidly established traditions, but rather, on a paradoxical collectivity of reciprocal individualization,⁸⁴ we need the engagement of trust. The importance of trust derives directly from the nature of human beings as social animals who can only satisfy most of their needs by means of coordinated and cooperative activities.⁸⁵ And any form of cooperating activity requires the co-operators to trust one another to do their bit.⁸⁶

3.5. Conclusion

This chapter presents a, perhaps paradoxical, conclusion that the more “autonomous” we become, the more uncertain our lives are. Liberation entails that the certainties provided by the structures of traditional social forms are becoming disintegrated. The disappearance of guaranteed jobs for life, the increased visibility of diverse sexualities and identities, the elective and ambiguous character of interpersonal relationships and institutionalised pressures on self-sufficiency, have all led many sociologists to argue that modern life is becoming more anxiety-ridden than it has ever been before. An individual of the contemporary Western world is facing uncertainty and growing anxiety and is consequently faced with compulsion to find and invent new certainties for oneself without them.

This chapter maintains that autonomy claims originated from uncertainty caused by the decline of traditional ways of living, dealing with the abundance of choices, presented to us by the modern world, and the institutionalised pressure to live an autonomous, individualised life. It was the search for security, confidence and control, I argued, that lies at the origins of autonomy claims. In a sense the fading of traditional authority has created a vacuum in social relations that is being filled by regulation. The Human Rights Court’s response to these concerns is, however, inadequate.

⁸⁴ U. Beck, note 5 above, at xxi.

⁸⁵ S.I. Benn, R.S. Peters, *Social Principles and the Democratic State*, Allen & Unwin, 1977, at 279.

⁸⁶ A. Baier, “Trust and Antitrust”, (1986) 96(2) *Ethics* 231-260, at 232.

Individual autonomy casts human beings in the contexts of family life and medicine as self-sufficient individuals and guardians of their own interests. In this way it upholds and enforces individualisation, rather than responds to any of the problems the processes of individualisation creates and causes for personal lives and human well-being. However, the way the Human Rights Court responds to these new disputes is crucial in defining the new type of social commitments that inevitably come about when previous bonds and rules break down.

The indeterminacy of social action coupled with an ever-widening range of social interaction and interdependence, makes trust increasingly relevant for social interaction. Living in a highly individualised culture means that you have to be socially sensible and be able to relate to others and to obligate yourself, in order to manage and to organise your everyday life. This, consequently, raises the question of the recognition of our mutuality – the interdependence of our choices – and the recognition of the binding forces of this mutuality. In an era of uncertainty in interpersonal relations, trust becomes increasingly important as a “regulator” of behaviours.

Having laid down the social basis for the need for trust and the social conditions that necessitate the engagement of trust, it becomes necessary to look more closely into whether and in what way the ECtHR has approached the issue.

CHAPTER 4

AUTONOMY, LAW AND TRUST

4.1. Introduction

Trust is a crucial factor in managing the modern world's complexities and uncertainties, yet concerns have grown over whether trust in interpersonal relationships is, in fact, in decline.¹ The problem, then, becomes how to reverse the deterioration of trust in our everyday lives. The previous chapter showed that by looking for authority that could guarantee higher levels of security and confidence in matters pertaining to one's health, procreation and death, people more often now have recourse to human rights litigation, appealing to their right to autonomy. The increasing dependence on institutions in personal matters shows that the resulting vacuum left from traditional forms of trust is filled with alternative arrangements providing similar functions and meeting universal need for certainty, predictability, order and the like.²

Seeing it in this way, the introduction of individual autonomy into the human rights law and the subsequent increase in legalisation of personal matters can be perceived both as a symptom of decrease in trust and as the functional equivalent of trust. The question central to this chapter is whether the concept of individual autonomy as developed under the European Human Rights Convention can successfully complement trust – e.g., does it have the effect of enhancing trust and trustworthy action? In order to evaluate that, I will proceed in the following manner.

¹ In 2009 the Joseph Rowntree Foundation initiated a consultation among leading thinkers, activists and commentators, as well as the wider public, on identifying the problems that pose the greatest threat to the British society in the 21st century. The results were published in the book called *Contemporary Social Evils*, Policy Press, 2009. The book argued that the erosion of trust in interpersonal relationships was one of the most clearly felt “evils” of contemporary British society. See also O. O'Neill, *A Question of Trust: The BBC Reith Lectures*, CUP, 2002; A.I. Tauber, *Patient Autonomy and the Ethics of Responsibility*, The MIT Press, 2005, Ch 5.

² P. Sztompka, *Trust. A Sociological Theory*, CUP, 1999, at 115.

The previous chapter argued that the relevance of trust arises from the changes in social conditions that make lives increasingly complex and uncertain. It follows that it becomes more crucial to understand that trust is essential for our freedom and it is essential for dealing with the freedom of others. The working definition this thesis adopts is that trust is a way of managing uncertainty with our dealings with others by willingly making oneself vulnerable based on the belief that the trusted person will reciprocate and choose to behave in a trustworthy manner.

Since trust is always risky and potentially harmful, it is normally based on some kind of evidence, or various clues, which make people grant or withdraw trust, and equally, which make trusted parties accept trust and behave in a trustworthy manner. One of those “commitment devices” people turn to is law. Given the somewhat sceptical view towards law’s capacity to enhance trust, the chapter further explores the relationship between trust and law. Although it is rather common to perceive trust and law as opposites, it is more appropriate to treat them as complements. Law can positively support trust and encourage good behaviour through its expressive functions.

The chapter, hereafter, proceeds to explore the ways individual autonomy, as constructed by the Human Rights Court, ensures or promotes that people generally act in a trustworthy manner. In other words, the final part of the chapter explores the capacity of individual autonomy to deal with the uncertainties identified in Chapter 3 and the proposition that autonomy can complement trust. Based on a critical analysis of the ECtHR autonomy-related case law, I will reach the conclusion that individual autonomy as conceived at the moment under Article 8 case law undermines, rather than supports, trust in interpersonal relationships.

I argue that the problem with the construction of individual autonomy starts with the premise that distrust rather than trust is the factual basis or reality of contemporary relationships. I believe that, rather than accommodating distrust, human rights law should recognise and appreciate the centrality of trust to these relationships and guide medical, family and interpersonal practice towards building trust. Also, the law in this context should concentrate on influencing people to earn each other’s trust rather than focusing on accommodating other’s lack of trustworthiness. Trust, not

distrust, should dictate the model for human rights law in regulating human behaviour in the realms of interpersonal relationships.

Second, the unscrutinised adoption of measures that aim to increase one's autonomy – additional controls, complaints systems and appeal mechanisms – increasingly suggest that various professionals are mistrusted and that they are not expected to act on the basis of trustworthy motivations. If people receive signals that they are not trustworthy, they are likely to become less trustworthy. This, correspondingly, may trigger a wider culture of distrust, low morale, and may lead to professional stagnation.

Third, I examine the Human Rights Court's attitude towards one of the most blameworthy breaches of trust, that of lying and deception in interpersonal relationships. The dissatisfaction with the Court's present approach to uphold the primacy of informed consent – set to serve to protect individuals' autonomy and independence – is that under certain conditions the respective regulation acts as a social incentive to deceit.

The chapter concludes, accordingly, that the particular legal regulation – established by autonomy-related case law – does not increase trust, but is, in fact, counterproductive to trust and trustworthy action. In other words, the individualistic concept of autonomy is an inadequate component for dealing with lack of trust and needs to be reconsidered. Therefore an account of autonomy is needed that helps to enhance trusting and trustworthiness, and thus helps to support or induce trust. In response to this need, in the next, final, chapter I develop an account of caring autonomy for the moral basis of the practice of trust.

4.2. An overview of trust

An emerging recognition among scholars writing on trust is that “without trust, the everyday social life which we take for granted is simply not possible.”³ Although

³ D. Good “Individuals, Interpersonal Relations and Trust”, in D. Gambetta (ed) *Trust: Making and Breaking Cooperative Relations*, Basil Blackwell, 1988, at 32. See also A. Seligman, *The Problem of Trust*, Princeton University Press, 1997, at 13: “The existence of trust is an essential component of all enduring social relationships.”

some form of trust is necessary for the continued operation of any social order,⁴ the issue of trust has become more urgent and central under the conditions of uncertainty and risk.⁵ As the previous chapter argued, the augmented requirement of trust in interpersonal relationships is closely connected with the loosening of restrictions set by “tradition” and the growth of “autonomy” in people’s lives. This section further explains the intimate relation between that of autonomy and trust and the importance of placing trust intelligently. This sets the stage for assessing the capacity of law and the capacity of the particular concept of autonomy to complement trust.

4.2.1 Nature and significance of trust

According to Niklas Luhmann a complete absence of trust would prevent someone even from getting up in the morning:

He would be prey to a vague sense of dread, to paralysing fears...Anything and everything would be possible. Such abrupt confrontation with the complexity of the world at its most extreme is beyond human endurance.⁶

Indeed, human life would turn into a pathological paranoia if we had to suspect constantly that others around us might attack us. In order to survive and keep one’s sanity, trust must supersede distrust.⁷ Following Luhmann, I consider trust important in two crucial and interconnected ways: it is crucial for our own freedom and it is crucial for dealing with the freedom of others.⁸ Or put it in another way, we need trust because we have to be able to rely on others acting as they say that they will, and because we need others to accept that we will act as we say we will.⁹ This dual function gives trust necessarily a relational character. To be sure, trust is the basis for autonomous action. Trust liberates human agency and “releases creative, uninhibited,

⁴ A. Seligman, note 3 above, at 7-8.

⁵ B.A. Misztal, *Trust in Modern Societies: The Search for the Bases of Social Order*, Polity Press, 1996, at 9.

⁶ N. Luhmann, *Trust and Power: Two Works by Niklas Luhmann*, John Wiley & Sons, 1979, at 4.

⁷ Ibid.

⁸ “The world is being dissipated into an uncontrollable complexity; so much so that any given time people are able to choose freely between very different actions.” See N. Luhmann, note 6 above, at 24; See also J. Dunn, “Trust and Political Agency”, in D. Gambetta (ed) *Trust: Making and Breaking Cooperative Relations*, Basil Blackwell, 1988, 73-at 80.

⁹ O. O’Neill, note 1 above, at 4.

innovative activism towards other people.”¹⁰ The uncertainty and risk towards others’ actions is lowered and “possibilities of action increase proportionally to the increase in trust.”¹¹ Autonomy is a capacity that is made possible by relationships based on trust. Trusting relationships are necessary for autonomy to flourish throughout one’s life. Let me expand this thought a bit further.

People most often act in the presence, and in connection with, the actions of many others. The action of those others is in many degrees uncertain and uncontrollable. It is what Annette Baier calls the “discretionary powers of others”¹² and Adam Seligman as the “freedom, agency, and hence fundamental inscrutability of the other.”¹³ It is the human agency and autonomy that we rightly so value, yet which makes other people’s motives, intentions and reasons unpredictable and potentially harmful. A crucial element of trust is, therefore, that of uncertainty – trust is needed when and because we lack certainty about others’ future actions.¹⁴ It is a matter of relying on what others say and what they undertake to do, without the certainty of the outcomes. Trust is never without risks. No trust is involved where our behaviour is dictated by complete control or coercion. In situations where actions or outcomes are guaranteed and expectations are certain and strong, trust is redundant.¹⁵

However, we cannot do without trust, since trust provides us the freedom to engage in projects that we otherwise could not or would not undertake on our own. It opens the door to positive outcomes that would be impossible without it. Our life, health, our offspring and their well-being are some of the things we cannot either create or sustain single-handedly. Due to the nature of human beings as social animals and due to our limited epistemic and practical capacities, we can satisfy most of our needs only by means of coordinated and cooperative activity. For example, I would need trust for undergoing a medical procedure, for agreeing to marry someone or for going on a boat trip. Each of us has a wide range of needs, interests, goals, desires, wants,

¹⁰ P. Sztompka, note 2 above, at 103.

¹¹ N. Luhmann, note 6 above, at 40.

¹² A. Baier, “Trust and Antitrust”, (1986) 96(2) *Ethics* 231-260, at 237.

¹³ A. Seligman, note 3 above, at 69.

¹⁴ N.C. Manson, O. O’Neill, *Rethinking Informed Consent in Bioethics*, CUP, 2007, at 162; P. Sztompka, note 2 above, at 20.

¹⁵ V. Held, “On the Meaning of Trust”, (1968) 78(2) *Ethics* 156-159, at 157; O. O’Neill, *Autonomy and Trust in Bioethics*, CUP, 2007, at 13; P. Sztompka, note 2 above, at 21-23.

and none of us is self-sufficient. We are all profoundly linked in countless ways we can hardly perceive. We depend on other people's knowledge, expertise and goodwill to lead a viable and minimally secure life, "let alone anything like a life worth living."¹⁶ Our decisions, choices, actions are inspired and motivated by others to no small extent. We are not the sole authors of our destiny, each of us; our destinies are entangled – messily, unpredictably. Trust is, therefore, of much importance because its presence or absence can have a strong bearing on what we choose to do and in many cases what we can do.¹⁷ In other words it has a strong impact on exercising one's autonomy if we conceive it as making choices on one's health, death, identity or on matters of reproduction. The effective exercise of autonomy can only rely on willingness to trust and to be trusted.

On the other hand, if distrust is prevailing in our relationships with others, our freedoms are substantially limited. Either we would, in extreme cases, stay in bed, paralysed with fear, as suggested by Luhmann, or we would have to invest a considerable amount of time and resources to ease those fears and insecurities. Take for example a married couple where a woman does not trust her husband in managing money. It becomes necessary for her to spend an enormous amount of time overseeing, questioning, challenging and arguing with his dubious decisions about investments and purchases. The restrictions this behaviour imposes on one's life are clear. Conversely, consider a case where a husband does not trust his wife and decides to go through her emails. How is he supposed to know whether James is 21 or 65 years old, whether David signs *everything* with an "x", or if "thanks for your insights" is a code for unfaithful activity? He cannot know. He then has to find out, and considering the amount of email activity his wife has, it can become a full-time job.

In the same vein, if people lack in trust towards doctors, they will not seek care, submit themselves to treatment, disclose necessary information or follow treatment recommendations.¹⁸ They may end up sitting alone with their illness and watch how

¹⁶ N.C. Manson, O. O'Neill, note 14 above, at 159.

¹⁷ P. Dasgupta, "Trust as a Commodity", in D. Gambetta (ed) *Trust. Making and Breaking Cooperative Relations*, Basil Blackwell, 1988, at 51.

¹⁸ M.A. Hall, "Law, Medicine and Trust", (2002) 55 *Stanford Law Review* 463-527, at 478.

it robs them of their freedom of movement, freedom of pursuing the preferred career – potentially affecting a whole range of activities necessary for enjoyment of a full and autonomous life. Of course, even if distrust prevails, they may still decide to go to see a doctor, however with a degree of pessimism and scepticism towards the physician. In these conditions, people might find it necessary to conduct complete background checks on their doctors and to do research of their own about illnesses affecting them and their treatments. Again, the overwhelming fears and anxieties that accompany the lack of trust rob the energy and time needed for getting well and returning to a state of good health. Not to mention the loss of therapeutic benefits associated with good trusting relationships, which are said to activate the self-healing mechanisms and to enhance the effects of therapies.¹⁹

In addition, it would give strong signals to the medical personnel that despite their trustworthy and competent action, you actually mistrust them. As Manson and O'Neill note, "other's trust, like their respect is of fundamental value to most of us. When others treat us as if we were untrustworthy, the results can be both psychologically and socially devastating."²⁰ If it is true that the moral psychology of being regularly trusted helps to create trustworthiness in people,²¹ the unwillingness to trust has the contrary effect of spreading fear, divisiveness and irresponsibility.²² All of this, again, would have a potentially detrimental effect on making the doctor-patient relationship dysfunctional, and eventually curb the freedom of both parties.

I can see already that there will be those who think that I am suggesting that everybody should place trust without questions asked. This is not the case. I do not suggest that we should place trust blindly – denying the evidence for distrust – or that we should practice simple trust – to trust unthinkingly or naively without any deliberation and ethical and/or evidential consideration – just in order to simplify our

¹⁹ Ibid. See also F.H. Miller, "Trusting Doctors: Tricky Business When It Comes to Clinical Research", (2001) 81 *Boston University Law Review* 423-443, at 427.

²⁰ N.C. Manson, O. O'Neill, note 14 above, at 161.

²¹ L.E. Mitchell, "The Importance of Being Trusted", (2001) 81 *Boston University Law Review* 591-617, at 599.

²² N.C. Manson, O. O'Neill, note 14 above, at 161; L.E. Mitchell, note 21 above, at 600.

lives.²³ Trust regardless of partners, situations and circumstances would be nothing short of stupid or pathological. Only trust that is placed intelligently and in a justified manner has the effect of building more trust, enhances cooperation and reduces complexity in our lives. But what makes trust justified?

4.2.2 Placing and responding to trust

Trust, as argued above, is crucial for human interaction, but it is also always risky and potentially harmful. Consider again medical practice. In order to get the necessary medical treatment, patients have to share with doctors information about their personal and family history and details about their symptoms that might be embarrassing and uncomfortable. Sometimes they have to appear disrobed, they have to allow their bodies to be touched and probed, they have to submit to tests that they never would have otherwise sought, and sometimes they even allow themselves to be made unconscious so that their bodies can be invaded with knives and body parts can be removed. Because in these and similar situations the stakes are high, we do not place trust randomly. In order to avoid loss and betrayal, a person's belief or expectation on the other person's trustworthiness is normally based on some kind of evidence, on various clues, which make people grant or withdraw trust, and equally, which make trusted parties accept trust and behave in a trustworthy manner. You do not trust a person to do something merely because he says he will do it. You trust him only because, knowing what you do of his disposition, his information, his ability, his available options and their consequences, his ability and so forth, you expect that he will choose to do it.²⁴ Trust is a way of managing uncertainty with our dealings with others by willingly making oneself vulnerable based on the belief that the trusted person will choose to behave trustworthily. His promise must be credible.²⁵

²³ For a thorough account on blind and simple trust, and the difference between them, see R.C. Solomon, F. Flores, *Building Trust in Business, Politics, Relationships and Life*, OUP, 2001, at 59-68.

²⁴ On the different grounds of trust see P. Sztompka, note 2 above, chapter 4.

²⁵ P. Dasgupta, note 17 above, at 51.

One has to keep in mind though that such grounds for trust are never conclusive or foolproof; they never give complete certainty about the correctness of the decision. Trust always remains a risk with a chance of losing. As observed by Luhmann:

The clues employed to form trust do not eliminate the risk, they simply make it less. They do not supply complete information about the likely behaviour of the person to be trusted. They simply serve as a springboard for the leap into uncertainty, although bounded and structured....Trust is more likely to be conferred when certain preconditions are met.²⁶

Among the widely considered clues are legal and professional regulations.²⁷ However, the issue whether law has the ability to induce people to be trustworthy and self-limiting is hardly a settled matter. Therefore, before examining whether the concept of individual autonomy has the capacity to promote trust and trustworthy action – whether law can provide incentives to the trusted to fulfil the trust and provide necessary knowledge to allow the truster to trust?²⁸ – I will explore the somewhat controversial relationship between law and trust.

4.3. Law and trust

While there is an agreement in scholarly writings that law and trust interact with each other,²⁹ there is disagreement about the effects of this interaction – is the law's influence on trust primarily positive or negative? Some claim that law itself is a source of the worrisome loss of trust we have supposedly suffered: the diminution of trust in society is associated with and attributed to the growth of the law and legalisation of relationships.³⁰ The critics argue that law by its inherently adversarial

²⁶ N. Luhmann, note 6 above, at 33.

²⁷ P. Sztompka, note 2 above, at 89; M.B. Blair, L.A. Stout, "Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law", (2001) 149 *University of Pennsylvania Law Review* 1735-1810, at 1747; See also M.A. Hall, note 18 above; D.M. Kahan, "Trust, Collective Action, and Law", (2001) 81 *Boston University Law Review* 333-347; C.A. Hill, E.A. O'Hara, "A Cognitive Theory of Trust", (2006) 84 *Washington University Law Review* 1717-1796;

²⁸ R. Hardin, "Street-Level Epistemology of Trust", (1993) 21(4) *Politics and Society* 505-529, at 505.

²⁹ F.B. Cross, "Law and Trust", (2004-2005) 93 *Georgetown Law Journal* 1457-1545; M.A. Hall, note 18 above; F. Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity*, New York: Free Press, 1995; M.B. Blair, L.A. Stout, note 27 above; R. Hardin, "Trustworthiness", (1996) 107(1) *Ethics* 26-42; D.M. Kahan, note 27 above; C.A. Hill, E.A. O'Hara, note 27 above; T. Frankel, "Trusting and Non-Trusting on the Internet", (2001) 81 *Boston University Law Review* 457-478; I. Goldberg et al., "Trust, Ethics and Privacy", (2001) 81 *Boston University Law Review* 407-422.

³⁰ F. Fukuyama, note 29 above.

and calculating nature is intrinsically contrary to trust.³¹ They maintain that the increase in law has displaced trust as a foundation of relationships and caused thereby a loss of essential, intrinsic trust.³² Others claim, again, that actually the contrary is true – law has a crucial place to enhance trust and trustworthy action and it is indeed possible to foster trust through law.³³ By giving legal assurances of remedies through breaches of trust, the law makes parties more likely to be both trusting and trustworthy.³⁴

It appears that we are at the crossroads here – if the former allegation holds true then less law and litigation would be preferable. If too much regulation is more likely to harm than foster trust, then curbing rather than urging regulation seems best. Hence, we are likely to come to a conclusion that the introduction of the concept of autonomy into human rights law, and the regulation accompanying it, is superfluous and troublesome, if not harmful. However, if the proponents of the position that law's impact on trust is inherently positive are right, then autonomy regulation should be essentially a welcome addition to human rights protection.

I maintain that law can have a positive effect on trust. Alongside with the authors who distinguish between law's regulatory and expressive functions,³⁵ I believe that, in addition to restraining misbehaviour, law has also the ability to encourage good behaviour. By law's ability to enhance trusting and trustworthiness, it can build effectively greater overall levels of trust in interpersonal relationships. Given the undeniable societal value of trust, human rights law should be developed in a way to advance those objectives. This is not to say though that any legal mechanism is always suitable for enhancing trust and trustworthiness. Sometimes, even when the intentions are good, the regulation may backfire. It is, therefore, essential to evaluate the content of particular laws related to trust and their compatibility with the nature of the particular social relationships under question.

³¹ S. Veitch, *Law and Responsibility. On the Legitimation of Human Suffering*, Routledge-Cavendish, 2007, at 84.

³² M.B. Blair, L.A. Stout, note 27 above.

³³ C.A. Hill, E.A. O'Hara, note 27 above, at 1752; R. Hardin, note 29 above.

³⁴ F.B. Cross, note 29 above, at 1483.

³⁵ See e.g. M.A. Hall, note 18 above.

4.3.1 Law as the source of decrease in trust

According to Francis Fukuyama, law has developed as a substitute for trust, necessitated by the breakdown of trusting relationships: “People who do not trust one another will end up cooperating only under a system of formal rules and regulations, which have to be negotiated, agreed to, litigated, and enforced, sometimes by coercive means.”³⁶ Whereas in many instances it can be observed that “law appears when trust fails,”³⁷ this is not to say yet that law is the one to blame for the decrease of trust in interpersonal relationships. Rather, the increase in law and litigation is arguably a symptom of the decline of trust in society caused by a more general realignment of relationships over the last fifty to sixty years,³⁸ and by a “decreased willingness to accept the authority of existing social structures and to work things out under the environment they provide.”³⁹ If anything, law’s intentions have been noble. Where trust is undermined, it has to be restored. And the expectation goes that the increasing attention paid to the protection of rights is to re-establish trust.⁴⁰ Arguably, the promotion of patient rights originates precisely from the breakdown in older patterns of doctor-patient trust,⁴¹ where informed consent, as “the modern clinical ritual of trust,”⁴² has become increasingly necessary where informal bonds of trust have eroded. Rights discourse is the primary mechanism through which the law is meant to redress the imbalance of power perceived to exist within the doctor-patient relationship.⁴³ In order to re-establish trust, informed consent and the advocacy of patient autonomy was introduced to ensure that patients have access to information to participate in decision-making and that they can themselves gauge

³⁶ F. Fukuyama, note 29 above, at 27.

³⁷ A.I. Tauber, note 1 above, at 185.

³⁸ A.I. Tauber, note 1 above, at 6.

³⁹ F. Fukuyama, note 29 above, at 311.

⁴⁰ O. O’Neill, note 1 above, at 27; O. O’Neill, note 15 above, at 3.

⁴¹ A.I. Tauber, note 1 above, at 158-159.

⁴² P.R. Wolpe, “The Triumph of Autonomy in American Bioethics: A Sociological View” in R. DeVries, J. Subedi (eds) *Bioethics and Society: Constructing the Ethical Enterprise*, Pearson, 1998, 38-59, at 50.

⁴³ K. Veitch, *The Jurisdiction of Medical Law*, Ashgate, 2007, at 103; J.D. Moreno, “The Triumph of Autonomy in Bioethics and Commercialism in American Healthcare”, (2007) 16 *Cambridge Quarterly of Healthcare Ethics* 415-419, at 415.

whether procedures should be performed. “In this more sophisticated approach to trust,” as O’Neill observes, “autonomy is seen as a precondition of genuine trust.”⁴⁴

Similarly, law has been arguably accommodated to the growth of distrust in the areas of family law. The courts now increasingly recognise the organisation of spousal relationships through legally binding contracts, e.g. prenuptial agreements or distribution of property on divorce, suggesting that the parties do not trust each other enough to rely on informal exchange.⁴⁵ People enter into legally binding contracts when they do not believe that those whom they plan to deal with will reliably act in their interests.⁴⁶ As marriage is seen as being increasingly perilous, alternatives to it, e.g. legal recognition of co-habitation, look more attractive.⁴⁷ On the other hand, as Schneider observes, co-habitation is itself risky. It is in some ways riskier than marriage, since people usually enter it less deliberately than marriage, with less commitment to each other and with less sense of what to expect from each other.⁴⁸ To reduce these risks, many jurisdictions have adopted regulations to resolve the separating couple’s disputes over their economic interests.

Whereas the starting point in analysing the relationship between trust and law might be non-partisan and even supportive towards law’s role to re-establish trust, commentators increasingly suggest now that the complex systems of legal regulation, accountability and control seem actually rather to diminish than foster trust.⁴⁹ As explained by one health care commentator:

The language of rights and the language of trust move in opposite directions from one another. The scrupulous insistence on observance of one’s rights is an admission that one does not trust those at hand to care properly for one’s welfare. This point can be seen in the fact that “rights” are a peculiarly modern language, developed for and appropriate to the

⁴⁴ O. O’Neill, note 15 above, at 19.

⁴⁵ A.A. Marston, “Planning for Love: The Politics of Prenuptial Agreements”, (1997) 49 *Stanford Law Review* 887-916.

⁴⁶ C.E. Schneider, “Family Law in the Age of Distrust”, (1999) 33(3) *Family Law Quarterly* 447-460, at 458-459.

⁴⁷ C.E. Schneider, note 46 above, at 459.

⁴⁸ *Ibid.*

⁴⁹ See O. O’Neill, note 1 above; O. O’Neill, note 15 above; M. Kohn, *Trust, Self-Interest and the Common Good*, OUP, 2008.

highly impersonal social relationships that characterize our times, times in which the breakdown of trust is endemic.⁵⁰

On such a view, not only has law, according to these critics, failed to re-establish trust, but it simultaneously undermines the “organic” forms of trust and it introduces new grounds for distrust.⁵¹

4.3.1.1 Loss of “organic” trust

This strand of criticism contends that increased legal regulation of society has squeezed out traditional, “organic”, relationships of trust. Law interferes where it should not. According to these authors “optimal levels of trust and distrust emerge through private ordering, without the assistance of law.”⁵² They argue that the more areas of social interaction are left under legal regulation, the more people lose their ability to negotiate, and in the end, the development of trust is halted.⁵³ As the law expands, it does not simply fill the void left from the decline of trust, but it also “replaces extra-legal systems of trust in arranging human relationships.”⁵⁴ The more people depend on rules to regulate their interactions, the less they trust each other, and *vice versa*.⁵⁵

The main concern here is that we are losing something valuable if we replace “organic” trust with legal regulation that only manages, if even this, to mimic trust. Following Blair and Stout, external incentives such as law can “reduce levels of trust and trustworthiness within interpersonal relationships by eroding the participants’ internal motivations to trust.”⁵⁶

The weaknesses of this sort of criticism include the fact that it seems to overlook that some of the traditional forms of trust were based on the lack of alternatives, i.e. – relationships were driven by and founded on paternalism rather than on any true and

⁵⁰ R. Sherlock, “Reasonable Men and Sick Human Beings”, (1986) 80 *The American Journal of Medicine* 2-4, at 3.

⁵¹ See e.g. M.B. Blair, L.A. Stout, note 27 above, at 1745.

⁵² M.A. Hall, note 18 above, at 484.

⁵³ A. Seligman, note 3 above, at 173.

⁵⁴ F. Cross, note 29 above, at 1485.

⁵⁵ F. Fukuyama, note 29 above, at 224.

⁵⁶ M.B. Blair, L.A. Stout, note 27 above, at 1739; See also L.E. Ribstein, “Law v Trust”, (2001) 81 *Boston University Law Review* 553-590.

authentic relationship of trust.⁵⁷ This sort of criticism seems to rest, at least to a certain extent, on a nostalgic vision of past-times, when doctors knew best⁵⁸ and marriages were agreeable lifelong commitments. In the doctor-patient relationship, what was considered to be a paradigm manifestation of trust was rather a form of paternalism that institutionalised opportunities for abuse of trust⁵⁹ or called for placing trust gullibly or blindly. This relationship was characterised by a high degree of confidence in the person trusted, the trusting person being either devoid of distrust or in denial of distrust. Similarly, much of the history of marriage demonstrates that mutual trust and mutual trustworthiness in a good cause – upholding traditional family values and providing children with proper parental care – can co-exist even with the oppression and exploitation of half the trusting and trusted partners. As Annette Baier reminds us, “...trust can co-exist and has long co-existed with contrived and perpetuated inequality.”⁶⁰ Therefore it is hard to perceive the weakening of these forms of trust in family and medical settings as negative. What becomes crucial, however, is to see what kind of devices can provide conditions for trust that is better placed and responded to.

Another aspect of the critical argument that law “crowds out” inherent forms of trust relates to the conceptual disagreement about the meaning of trust – whether true trust is essentially affective⁶¹ or is it largely calculative.⁶² Those who believe that trust is essentially affective or emotion-based consider it to be more of a feeling than a

⁵⁷ O. O'Neill, note 15 above, at 17-18; J. Montgomery, “Law and Demoralisation of Medicine”, (2006) 26(2) *Legal Studies* 185-210, at 187.

⁵⁸ R.M. Veatch, “Doctor Does Not Know Best: Why in the New Century Physicians Must Stop Trying to Benefit Patients?”, (2000) 25(6) *Journal of Medicine and Philosophy* 701-721; See also R. Sherlock, note 50 above, at 3, exemplifying well the paternalistic attitude that he conceives as “trust”: “The patients typically want to entrust their care to an authoritative leader, one who will make them well on the basis of superior knowledge and skill. The physician’s trust in the patient is typically a “trust” that the patient will do what he or she must to enhance his or her health.”

⁵⁹ O. O'Neill, note 15 above, at 18. See also M.C. Nussbaum, “The Future of Feminist Liberalism”, in C. Calhoun (ed) *Setting the Moral Compass: Essays by Women Philosophers*, OUP, 2004, 72-88.

⁶⁰ A. Baier, “Trust and Its Vulnerabilities”, in A. Baier *Moral Prejudices: Essays on Ethics*, Harvard University Press, 1995, 130-151, at 131.

⁶¹ For philosophical views that see trust primarily as affective, see: L.C. Becker, “Trust as Noncognitive Security about Motives”, (1996) 107 (1) *Ethics* 43-61; K. Jones, “Trust as an Affective Attitude”, (1996) 107(1) *Ethics* 4-25.

⁶² In support of this account see: R. Hardin, note 29 above; C.A. Hill, E.A. O'Hara, note 27 above; R. Holton, “Deciding to Trust, Coming to Believe”, (1994) 72(1) *Australasian Journal of Philosophy* 63-76.

thought or assumption.⁶³ According to one of the proponents of this view, to trust a person is to have an attitude of optimism about that person's goodwill and to have the confident expectation that, when the need arises, the person will be directly and favourably moved by the thought that he or she is being counted upon and trusted.⁶⁴

The question raised here is whether law can also support trust based on an emotional approach. How is law to overcome its negative message of mistrust? One of the answers may lie in distinguishing between law's regulatory and expressive functions, and determining whether these effects are likely to be complementary or competing. In the latter event, we must decide which is likely to dominate and how to minimise the suppression of trust. Often, this path of reasoning may advise us to adopt broad standards rather than detailed rules, and it may counsel us to have rather weak or nondirective enforcement mechanisms.⁶⁵

Trust is something that must be learned.⁶⁶ Norms, such as trusting behaviour, are not genetically created, but are produced by the course of human interaction, which law is a part of. The laws that society chooses are an expressive statement of what society values. Such statements, in turn, can cause behavioural norms to shift.⁶⁷ A strong legal devotion to trust can therefore strengthen the extra-legal norms of trusting and trustworthiness. As Blair and Stout demonstrate, experiments show that when the social conditions are right, people's cooperative, other-regarding personalities emerge. Social "framing" plays a critical role in determining whether or not individuals choose to trust and be trustworthy.⁶⁸ Experiments indicate that individuals trying to decide whether a particular social context calls for cooperation or competition are remarkably sensitive to the signals they receive from the experimenter who defines and has the authority over the game. That is the reason Blair and Stout see courts as powerful and effective vehicles for performing the framing function.⁶⁹

⁶³ F.B. Cross, note 29 above, at 1464.

⁶⁴ K. Jones, note 61 above, at 5-6.

⁶⁵ M.A. Hall, note 18 above, at 511.

⁶⁶ R.C. Solomon, F. Flores, note 23 above, at 9; M.B. Blair, L.A. Stout, note 27 above, at 1742.

⁶⁷ M.A. Hall, note 18 above, at 501.

⁶⁸ M.B. Blair, L.A. Stout, note 27 above, at 1742-1743.

⁶⁹ *Ibid.*, at 1797.

These findings support the idea that the conceptualisation of autonomy and what it means to be an autonomous person in human rights law jurisprudence can provide guidance on proper motives and conduct that filter down on those acting in interpersonal relationships. By fleshing out the social context of the relationship under issue, and emphasising the moral commitments a particular contextual relationship calls, the Human Rights Court can play through its expressive functions an important part in trust-inducing practices. In that way we can appreciate that human rights law can influence behaviour not just by imposing sanctions but also by shaping perceptions of what sort of behaviour is expected and appropriate.

4.3.1.2 *New grounds for distrust*

Critical views concerning law's impact on trust go further. Similarly sceptical as the above-mentioned scholars is Scott Veitch about the increased influence and invocation of legal norms as a way of "responsibilising" activities that were previously left under the control of extra-legal forces.⁷⁰ According to Veitch, the increase in litigation fails to make people trustworthier, and more "attuned to the suffering of others."⁷¹ Furthermore, he claims that such "legal solidarity" represents solidarity of a very distinctive type, that is, "a highly emaciated solidarity corresponding in its modern form to the "society of strangers"; a solidarity, in other words, that is based on a calculative or calculating measure, the form of which is essentially that of competing rights claims and their adjudication."⁷² Arguably what Veitch then says is that not only does law fail to support trust and trustworthy behaviour, but law's respective efforts are altogether counterproductive to trust.

This resonates well with the scholars writing in the field of human rights who have made similar contentions regarding the increase in individual rights and its expression in litigation as undermining interpersonal cooperation and the existence of trusting relationships. The complaint is that when we talk and think in terms of rights, we set ourselves apart from others. Rights belong to individuals, so the appeal to rights encourages us to think of ourselves as apart from and threatened by a

⁷⁰ S. Veitch, note 31 above, at 84.

⁷¹ Ibid.

⁷² S. Veitch, note 31 above, at 85.

society, state or government that is constantly seeking to intrude or invade our rights.⁷³ As was noted already at the very beginning of the thesis, Joseph Weiler has recently been critical towards the prevailing human rights culture. He says that it is not conducive to the virtues and sensibilities necessary for real community and solidarity.⁷⁴ Similarly, Fukuyama has argued that the decline of trust is to be attributed to the growth of legalistic “rights-based individualism.”⁷⁵

In the field of medical law, Jonathan Montgomery worries that law’s increasing involvement in medical care takes morality out of medicine and moves “the discipline in which the moral values of medical ethics are a central concern to one in which they are being supplanted by an amoral commitment to choice and consumerism.”⁷⁶ The development of law without the special trust in doctors has resulted, according to Montgomery, in amorality – not more morality.

As I see it, the claims and criticisms presented above do not attack law as much as they attack the particular construction of it. What they question is whether certain legal mechanisms may cause such effects on human behaviour that the formation of trusting relationships becomes under these conditions highly problematic. For example, when the concept of individual autonomy demands one to be independent and self-sufficient, then one feels less compelled to accommodate his or her behaviour to other people’s wants and will. As a consequence it makes people doubt that other people will behave in a trustworthy manner.

This construction of autonomy may have its appropriate and relevant place in the consumer market, for instance. In other, perhaps more personal contexts, the same construction of it proves to be inadequate or even detrimental to other values at stake.

Effectively what becomes clear is that rather than *all* law, it is the particular construction of the law that is arguably counterproductive to certain interpersonal

⁷³ R. Dagger, *Civic Virtues. Rights, Citizenship, and Republican Liberalism*. OUP, 1997, at 3.

⁷⁴ J.H.H. Weiler, “Europe – Nous coalisons des États, nous n’unissons pas des hommes”, available at <http://www.iilj.org/courses/documents/2009Colloquium.Session9.Weiler.pdf>, at 31.

⁷⁵ F. Fukuyama, note 29 above, at 314.

⁷⁶ J. Montgomery, note 57 above, at 186.

relationships. Nevertheless, the critical attitudes towards law's role in enhancing trust provide useful indications of where regulation may backfire.

4.3.2 Law as the source of increase in trust

As discussed above, we place trust in others usually with respect to a specific range of action. We place trust in people who have explicit responsibility over specific actions, have special knowledge, or are in some other way an authority over a topic of issue.⁷⁷ In that way we make ourselves vulnerable to the others who hold “the authority of superior knowledge”⁷⁸ at our occasions of need. Any profession possesses a set of knowledge, skills and powers that allows its practitioners to assume an authoritative position in their encounters with persons who need that expertise – e.g. persons who have become vulnerable because of illnesses, pregnancy, and or due to some other conditions. Therefore, a set of features has become criteria that distinguish a trustworthy professional from an untrustworthy one.

For instance, regulation imposes rigorous educational, training and performance standards on medical professionals and health care institutions; on airplanes and flight personnel; on primary school teachers and academic staff. In this case, law acts to strengthen people's trust in professionals by certifying the professional's expertise and authority. This helps people to follow through with actions such as going to see a doctor, taking a flight, sending one's child to school, or indeed employing someone for an airline company. Law targets here patients, customers and employers and conveys to them that they can and should trust the corresponding institutions and personnel.

Considering, for example, the differentiation and specialisation of roles in medicine, it is more likely than not that we do not know the doctors who treat us. How can we allow a stranger, a doctor we have never met or heard of before, to perform an open-heart surgery on our self if we have no knowledge of the doctor's personal characteristics? In this context the mechanisms of licensure and peer review can be

⁷⁷ N. MacCormick, *Practical Reason in Law and Morality*, OUP, 2008, at 70.

⁷⁸ Ibid.

seen as fostering trust towards the whole body of medicine, so that individual professionals do not have to earn trust to do their job for each instance.⁷⁹

Regulations can foster trust also in more subtle ways. They give professionals – doctors, pilots, or academics – what Frankel and Gordon term as “high regard” – “a description of special people in special elevated position expected to behave in a special way.”⁸⁰ High regard is accompanied by a measure of pressure – it involves not merely standing higher, but also falling harder. In contrast to a breach of contract, for example a breach of trust carries a stigma that cannot be expiated by payment alone.⁸¹ The implications of this analysis are that if, for example, a doctor-patient relationship becomes purely contract-based between two autonomous adults, not only will the doctors lose their elevated status, “but the deterrence resulting from the threat of this loss will be eliminated as well.”⁸²

To give another example, how law can arguably support trust in more indirect ways, consider the laws prohibiting doctors from assisting patients to commit suicide. Despite arguments that physician-assisted suicide is no different than physicians complying with patients’ decisions to reject life-sustaining treatment,⁸³ the law in the majority of European countries treats assisted suicide still as a form of homicide. Arguably, one of the reasons the law stays “inconsistent”⁸⁴ in end of life matters, is that it serves a function related to trust. These laws allow the doctors to maintain the image that they always promote life and never act as agents of death, out of concern that otherwise patients would not trust them. In cases pertaining to refusal of treatment, the doctor’s image remains intact since the patient dies from underlying causes and the doctor is not seen to be actively bringing about the patient’s death.

To conclude, rather than opposites, forms of law and trust can be seen as complements, with legal constraints enabling trust that otherwise would be perhaps

⁷⁹ M.A. Hall, note 18 above, at 508.

⁸⁰ T. Frankel, W.J. Gordon, “Introduction”, (2001) 81 *Boston University Law Review* 321-327, at 324.

⁸¹ Ibid.

⁸² Ibid.

⁸³ S.A.M. McLean, *Autonomy, Consent and the Law*, Routledge-Cavendish, 2010, chapter 4.

⁸⁴ S.A.M. McLean, note 83 above, at 126.

either blind or simple. If trusting is a matter of placing trust with good judgment, we need social and political institutions that allow us to judge where to place our trust.⁸⁵

Nevertheless, some caution is warranted in devising supportive measures. Not only may these efforts entail other costs and have no effect, they can also, paradoxically, weaken trust. This is so because law's regulatory functions can sometimes compete with its expressive functions, which can be unpredictable and complex.⁸⁶ For example, recently the UK Government has decided that doctors will be given annual assessments and full five-yearly checks to ensure that they are competent and fit to practice.⁸⁷ According to the plan, each doctor will be assessed on the basis of a dossier of evidence of the doctor's competence compiled over five years. This will include annual assessments and patient questionnaires.⁸⁸ Revalidation of doctors can be seen as one of the mechanisms in an effort to improve or support patients' trust towards the medical profession. Most likely it is expected that the regular assessment procedures will give patients assurance that doctors have up-to-date skills and knowledge to be able to offer the best possible care. However, scrupulous performance checks may, paradoxically, convey to the public that doctors are actually not trustworthy. Why else should they be checked all the time? Furthermore, it is not just the public that may be affected, but overregulation may negatively impact the performance of physicians as well. Such measures may suggest to doctors that they are not trusted and that they are not expected to act on the basis of trustworthy motivations. As was discussed before: trust often works in reciprocal ways. If you see that you are trusted, you act in a trustworthy way, and *vice versa*. Or as Davies argued: "If the government demonstrates that it does not trust doctors to maintain high standards of performance or to have considerable degree of autonomy in their practice, doctors may become disillusioned and cease to take personal pride in their work."⁸⁹

⁸⁵ O. O'Neill, note 1 above.

⁸⁶ M.A. Hall, note 18 above, at 509.

⁸⁷ S. Boseley, "Doctors to Be Given 'Fit to Practice Tests'", *The Guardian*, Friday, 19 October 2012.

⁸⁸ *Ibid.*

⁸⁹ A.C.L. Davies, "Don't Trust Me, I'm a Doctor: Medical Regulation and the 1999 NHS Reforms", (2000) 20(3) *Oxford Journal of Legal Studies* 437-456, at 455.

The core point is that sometimes less regulation or broad professional norms are better mechanisms to support trust than narrow and specific performance rules. There are still more trustworthy doctors out there than untrustworthy ones, and until there is evidence that trust towards physicians is destroyed, laws that express trust are preferable to sanctions and regulations.

4.4. Individual autonomy and trust in the practice of the European Court of Human Rights

If it were true that more regulation would involve some increase in trust, one would have to agree that the Human Rights Court has indeed contributed to trust promoting practices. More and more new areas of daily life are being subsumed under legal regulation with a view to empowering patients, family members and living partners with a stronger sense of autonomy and capacity to lead a life of one's own. Growth in legal regulation that aims to protect one's autonomy can be viewed with an expectation that it will increase trust in the ways we operate our lives, and create a stronger sense of security and control over matters of life and death, illness and health. The expectation can be that since greater rights and autonomy give individuals greater control over the ways they live and increase their capacity to resist others' demands and institutional pressures, it consequently has an effect of increasing trust in interpersonal relationships.⁹⁰

However, as I will demonstrate in the following pages, this proposition is questionable. It will be argued that the particular legal regulation – as established by autonomy-related case law through the reasoning of the Human Rights Court – is more likely to result in reduction of trust rather than increase in trust in interpersonal relationships.

First, it is argued that the problem with the particular construction of autonomy starts with the premise that distrust rather than trust is the factual basis or reality of contemporary relationships. An unlooked-for consequence of this approach is that

⁹⁰ O. O'Neill, note 15 above, at 3. See also A.I. Tauber, note 1 above, at 158.

the ECtHR does not engage in building trust, but it encourages distrust. And distrust only feeds more distrust.

Next, the section evaluates the potential effect of the mechanisms that aim to foster autonomous action – the requirements of informed consent and accountability – on inducing trust and trustworthy behaviour. It is argued that the accountability measures have detrimental impact on trust since they reduce the doctor's internal motivations for trustworthy action. If people receive signals that they are not trustworthy, they are likely to become less trustworthy.

Finally, this section turns from assessing whether the Court has openly and directly tried to achieve trust or any particular benefit from it, to looking into the attitude the Court has taken towards breaking trust. This means, above all, exploring the approaches the Court has taken towards cases involving deception, dishonesty and broken promises as instances of “ultimate breaches of trust.”⁹¹ It is concluded that the law and how it stands at the moment under the regulation of individual autonomy acts as a social incentive to deceive, and, therefore, is considered insufficient in terms of fostering trusting relationships.

4.4.1 The centrality of (dis)trust in the practice of the European Court of Human Rights

While the Human Rights Court – or human rights law in general for that matter – never discusses trust head on, it is hardly the case that the issue of trust has no relevance for its case law and for the individuals involved in it. In fact, several autonomy-based cases can be conceived as instances of breaches of trust.⁹² But this is, of course, hardly anything unusual. Many, perhaps even a great majority, of legal cases arise from some sort of violation of trust. This, in itself is unavoidable and not a matter of concern here. What I would like to do is draw attention to the proposition that the ECtHR Article 8 autonomy-related case law is based on the premise of distrust, where individual autonomy serves as the functional equivalent of trust. In other words, the Court takes the existence of distrust as factual premise for

⁹¹ R.C, Solomon, F. Flores, note 23 above, at 134.

⁹² E.g. *Evans v the United Kingdom*; *Tysiąc v Poland*.

introducing autonomy and its particular interpretation of it. Both trust and distrust have a self-generating and spiralling dynamic in which the starting attitude colours how people interpret subsequent particular events and actions. This spiral relationship applies also between lawmakers or law enforcers and the persons subject to the legal system. Just as the law reacts to the changes in people's behaviour, people change their behaviour in reaction to the law.⁹³ Accommodating distrust into the interpretation of the concept of individual autonomy then potentially increases rather than diminishes distrust in interpersonal relationships.

Rather than accommodating distrust, human rights law should recognise and appreciate the centrality of trust to these relationships and guide medical, family and interpersonal practice towards building trust. Attention should be concentrated on earning encouraging trustworthiness and trusting actions rather than focusing on accommodating people's lack of trustworthiness. The possible implications of this approach will be expounded in the subsequent sections.

In the following pages I will use the cases of *Reklos and Davourlis v Greece*⁹⁴ and *Ternovszky v Hungary*⁹⁵ to provide an explanation of the alleged atmosphere of distrust characteristic of interpersonal relationships that forms the basis of the Court's reasoning. In the light of these cases I will, thereafter, consider the effect of placing distrust in the centre of human rights analysis.

4.4.1.1 *Reklos and Davourlis v Greece*

In *Reklos and Davourlis v Greece*⁹⁶, the applicants were the parents of their newly born baby son. Immediately after birth the baby was placed in a sterile unit, under the constant supervision of the staff of the private clinic where he was born. On the second day after his birth, while the baby was still in the sterile unit, a professional photographer, located on the first floor of the clinic, photographed him. The photographer thereafter offered to sell the photos to the parents, who were disturbed by this. They demanded the clinic to take action and to hand over to them the

⁹³ T. Frankel, W.J. Gordon, note 80 above, at 326.

⁹⁴ Case of *Reklos and Davourlis v Greece* (App.1234/05), Judgment of 15 January 2009.

⁹⁵ Case of *Ternovszky v Hungary* (App.67545/09), Judgment of 14 December 2010.

⁹⁶ *Reklos and Davourlis v Greece*.

negatives of the photographs. As the clinic did not react, the parents sued. The national courts dismissed their action as unfounded – the photos were not made public and there was no harm done to the baby.

The parents appealed to the ECtHR claiming that their child's personality rights had been infringed. The Human Rights Court concurred, and found the violation of Article 8 based on the individual's right to control the use of her or his image. In response to the Greek Government's suggestion that Article 8 was not engaged if there was no use or distribution of the photographs of the applicants' son, the Court ruled that the taking of the photographs and the retention of the negatives themselves were enough to bring Article 8 into play. As the Court further articulated, a person's image is an essential attribute of his or her personality and belongs to the sphere of autonomy, where the individual has the right to choose whether it be recorded, conserved or reproduced.⁹⁷ The effective protection of this interest, according to the Court, presupposes obtaining the consent of the person concerned at the time the picture is taken or a proxy decision-maker in the case of someone who cannot consent on their own behalf, such as a child.

Throughout this chapter I have emphasised the importance of trust for interpersonal relationships. Trust is repeatedly said to be essential to the success of medical practice and the core of the doctor-patient relationship.⁹⁸ The vulnerability of patients and their need for care makes it essential to trust physicians. It is, therefore, often suggested that what we want more than anything else in our encounters with doctors is to be able to trust them.⁹⁹ Confidentiality is one of the key attributes for retaining that trust. Patients need to be able to trust their doctors to keep the intimate personal details about their behaviour and history as private secrets. In a medical setting, trust provides, therefore, a direct justification of the importance of confidentiality as one

⁹⁷ *Reklos and Davourlis v Greece*, paras 39-40.

⁹⁸ N.J. Moore, "What Doctors Can Learn from Lawyers About Conflicts of Interests", (2001) 81 *Boston University Law Review* 445-456, at 447; F.H. Miller, note 19 above, at 426; M.A. Hall, note 18 above, at 470; J.J. Chin, "Doctor-Patient Relationship: A Covenant of Trust", (2001) 42(12) *Singapore Medical Journal* 579-581, at 580; R. Rhodes, J.J. Strain, "Trust and Transforming Medical Institutions", (2000) 9 *Cambridge Quarterly of Healthcare Ethics* 205-217, at 206.

⁹⁹ C. Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law*, Hart Publishing, 2009, at 97; O. O'Neill, note 15 above.

of the most essential moral commitments of the profession.¹⁰⁰ The expectation that we can trust that our private matters will be respected extends to the environment of the medical setting and those who enter it, i.e. – it is not simply about medical relationships with medical personnel; it is also about the setting where we conduct intimate aspects of our lives, such as hospitals, etc. Indeed, violations in this setting by those who enter it from outside are a particular affront and breach of trust. The same level of requirements of confidentiality does not, and I believe should not, apply to interactions in every other private social setting. Taking photographs at a friend's or family member's birthday party, for example, is entertaining and perhaps even useful for the coming generations, but we would not reasonably have the same expectations of respect for private life as in a medical setting. In other words, trust in this setting demands the employment of a different set of morality and obligations. Following strictly the *Reklos and Davourlis* judgment, based on autonomy and consent, there is, however, no observance of the particular relationships involved; the individual's interest and need to control one's image are always to be considered paramount.

Following this, I suggest that rather than enunciating a right to control one's image, the Court could have founded its decision on the fact that the baby was photographed in what was essentially an intimate location, and in circumstances where there had to be a reasonable expectation of confidentiality. Instead, by concentrating on protecting the applicant's autonomy, the core value of preserving trust in this particular setting regrettably gets lost. It is replaced with a heightened attention to the clinic's or photographer's lack of trustworthiness. It was not,

[t]he nature, harmless or otherwise, of the applicants' son's representation on the offending photographs, but the fact that the photographer kept them without the applicants' consent. The baby's image was thus retained in the hands of the photographer in an identifiable form with the possibility of subsequent use against the wishes of the person concerned and/or his parents.¹⁰¹

¹⁰⁰ R. Rhodes, "Understanding the Trusted Doctor and Constructing a Theory for Bioethics", (2001) 22 *Theoretical Medicine* 493-504, at 498.

¹⁰¹ *Reklos and Davourlis v Greece*, para 42.

Before delving into the question of the impact of having distrust rather than trust as the starting point for autonomy regulation, I would like to consider another recent case from the ECtHR practice.

4.4.1.2 *Ternovszky v Hungary*

The second case I would like to present here is *Ternovszky v Hungary*.¹⁰² The applicant in this case was a pregnant woman who wished to give birth at her home rather than in a hospital or a birth home. Under Hungarian laws home births were not prohibited, but they were not encouraged or supported either, because of the inherent risks to the mother and the baby. Any health professional encouraging and assisting a home birth ran therefore the risk of conviction for a regulatory offence.¹⁰³ According to the applicant, this created for her a condition of uncertainty about what is allowed and what is not allowed, and consequently deprived her from making an informed choice about the alternatives of giving birth – a matter that “belonged to the hard core of self-determination”¹⁰⁴ and was protected under Article 8 of the Convention.¹⁰⁵ Hence, the purpose of her application was “to obtain an unhampered right to home birth without the assisting professionals facing sanctions but with access to an institution in case of complications.”¹⁰⁶ Ultimately what the applicant was looking for was a sense of security for the occasion if she chooses to give birth at home. She wanted the involvement of health care professionals and also for the conduct of their involvement to be regulated.

The Human Rights Court agreed with the applicant. It noted that “the notion of freedom implies some measure of choice as to its exercise” and that “the notion of personal autonomy is a fundamental principle underlying the interpretation of Article 8 guarantees.”¹⁰⁷ “Therefore,” the Court concluded, “the right concerning the decision to become a parent includes the right of choosing the circumstances of

¹⁰² *Ternovszky v Hungary*.

¹⁰³ *Ternovszky v Hungary*, para 6 and 17.

¹⁰⁴ *Ternovszky v Hungary*, para 20.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ternovszky v Hungary*, para 22.

becoming a parent.”¹⁰⁸ The Court further considered that, where choices related to the exercise of a right to respect for a private life occur in a legally regulated area, the State should provide adequate legal protection to the right in the regulatory scheme.¹⁰⁹ In the context of home birth, this implies, according to the Court, that the mother is entitled to a legal and institutional environment that enables her choice.¹¹⁰ Following from this, the Court found that the legal uncertainty – absence of specific, comprehensive legislation on the matter – limited the choices of the applicant considering home delivery.¹¹¹ As a result Hungary was in breach of the Convention.

Compared to the *Reklos and Davourlis* judgment discussed above, *Ternovszky* was not initiated by a specific case of breach of trust. Nevertheless, it was sustained by a strong attitude of distrust. First, the case indicated the applicant’s distrust towards the “traditional” way of giving birth in a hospital despite “the professional consensus in Hungary to the effect that home birth was less safe than birth in a health care institution.”¹¹² Some clues explaining the possible sources and causes of this distrust can be found in the Recommendation of the World Health Organization report attached to the judgment as an expert opinion.¹¹³ According to the report, women opt out from giving birth in professional health care facilities, *inter alia*, because of unfamiliar practices, inappropriate staff attitudes and restrictions with regard to the attendance of family members at birth.¹¹⁴

Second, it seemed that the applicant did not also trust the medical opinion in Hungary. As the Government submitted, there was a professional consensus in Hungary to the effect that home birth was less safe than birth in a health care institution. Although, with regard to one’s right to self-determination, since 1997 home birth was no longer prohibited, it was not encouraged or supported by the

¹⁰⁸ Ibid.

¹⁰⁹ *Ternovszky v Hungary*, para 24.

¹¹⁰ Ibid.

¹¹¹ *Ternovszky v Hungary*, para 26.

¹¹² *Ternovszky v Hungary*, para 17.

¹¹³ *Ternovszky v Hungary*, para 11.

¹¹⁴ Ibid.

physicians. The risks to the health and life of the mother and the child were still considered high.¹¹⁵

Third, since home birth was unregulated in Hungary, it did not provide enough security towards birth care professionals. The applicant did not trust to contact and rely on a birth care professional without the existence of regulatory guarantees. The concurring Judges Sajó and Tulkens put it this way: “regulation in the medical environment of welfare system is the default and only what is regulated is considered safe and acceptable...[what] was a matter of uncontested private choice becomes unusual and uncertain.”¹¹⁶

I do not agree with Judges Sajó and Tulkens that the environment of the welfare system requires that everything should be regulated. Rather, as the previous chapter argued, the increase in regulation that is based on claims for respect for one’s autonomy is evidence that trust is missing in interpersonal relationships and that void in the end is filled with a functional equivalent to trust – that is with distrust. This might sound contradictory, but as Luhmann observes: “Anyone who does not trust must turn to functionally equivalent strategies for the reduction of complexity in order to be able to define practically meaningful situation at all. He must turn his expectations into negative ones, and so must, in certain respects, become distrustful.”¹¹⁷

As Luhmann further stresses, despite trust and distrust being functional equivalents, they are functionally very different in their implications for a person’s actions or for social organisation more generally. In a group or society in which people are trustworthy, trust enables mutually beneficial cooperative endeavours. Distrust blocks it.¹¹⁸

Distrust connotes an attitude of wariness or pessimism. To have a pessimistic attitude is to expect that the other is likely to harm my interests, and thus to treat him or her warily or with suspicion. It means taking your role-partner as an enemy who is likely

¹¹⁵ *Ternovszky v Hungary*, para 17.

¹¹⁶ *Ternovszky v Hungary*, Joint concurring opinion of Judges Sajó and Tulkens.

¹¹⁷ N. Luhmann, note 6 above, at 71.

¹¹⁸ R. Hardin, “Distrust”, (2001) 81 *Boston University Law Review* 495-522, at 503.

to act against your interest or, at least, for whom your interests are a matter of complete indifference. In order for you to be able to respond, certain characteristics become more important than others: one needs to be independent, self-sufficient, assertive, and above all, defensive.

Distrustful parties put more effort into securing themselves against its breakdown by use of devices outside the relationship – and this reduces dependency on the partner. Hence, distrust is circularly reinforced by the actions it provokes.¹¹⁹ Distrust creates a distance and the expression of that distrust generates a further distance, an alienation of affection.¹²⁰

It is understandable that cases such as *Reklos and Davourlis* and *Ternovszky* arise because of mistrust or lack of trust. However, the job for the Court should be to make an effort to build trust or support it, where it is lacking. This is especially important in the contexts of medical care or family setting. Instead, the ECtHR currently starts with the premise that distrust against the medical profession is justified and that they should be treated as untrustworthy. This approach only creates more distrust, and in the end may produce dysfunctional consequences for the wider society.¹²¹

4.4.2 Increasing trust by increasing control and accountability

Chapter 2 argued that effective and accessible procedural guarantees set by law are an important part of safeguarding one's autonomy. In the light of the present chapter we can perceive the growth in regulation and control, on the one hand, as a symptom of distrust, and on the other hand, as its remedy. But have these instruments of control, regulation and monitoring worked? The following analysis suggests that they have not, albeit that this is not intended as a comprehensive review or factual account of actual behaviours involving trust.

¹¹⁹ R. Hardin, note 118 above, at 500.

¹²⁰ R.C. Solomon, F. Flores, note 23 above, at 33.

¹²¹ P. Sztompka, note 2 above, at 116.

4.4.2.1 *R.R. v Poland*

Consider the case of *R.R. v Poland*,¹²² similar to *Tysiąc v Poland*,¹²³ discussed in Chapter 2. The applicant – a 29-year old woman, married with two children – was pregnant with her third child. In the 18th week of her pregnancy an ultrasound scan showed that the foetus might be affected by some malformation. The applicant then told her doctor that, if the suspicion proved true she wished to have an abortion.¹²⁴ The results of the subsequent ultrasound scans confirmed the likelihood of foetus malformation and the applicant's fears that the foetus was affected with a genetic disorder. In order to confirm or dispel the suspicion and to identify the nature and seriousness of any foetal defect, genetic examination was recommended as the only possible method to objectively establish the correct diagnosis. However, for reasons related to the doctors' moral reluctance to carry out abortions and matters pertaining to the reimbursement of the costs of the test, none of the doctors the applicant came into contact with during her treatment gave her the necessary referral to have genetic tests carried out. Hence, despite the applicant's persistent efforts, through numerous visits to doctors and through written requests and complaints, she did not succeed in obtaining the required genetic test until the 23rd week of her pregnancy. The test confirmed the presence of Turner syndrome.¹²⁵ By that time it was too late for an abortion to be carried out and, on the 11th of July 2002, the applicant gave birth to a baby girl affected with the syndrome.

Unhappy with the manner in which the doctors had handled her case – their failure to perform timely prenatal examinations and to provide her with reliable and timely

¹²² Case of *R.R. v Poland* (App.27617/04), Judgment of 26 May 2011.

¹²³ Case of *Tysiąc v Poland* (App.5410/03), Judgment of 20 March 2007; See Chapter 2 Section 2.3.1

¹²⁴ According to Section 4(a) of the 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act abortion is legal in Poland only if a) pregnancy endangers the mother's life or health; b) prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening ailment; or c) there are strong grounds for believing that the pregnancy is a result of criminal act.

¹²⁵ A genetic condition in which a female does not have the usual pair of two X chromosomes. Girls who have this condition usually are shorter than the average and infertile due to early loss of ovarian function. Other health problems that may occur with this condition include kidney and heart abnormalities, high blood pressure, obesity, diabetes mellitus, cataract, thyroid problems, and arthritis. Girls with Turner syndrome usually have normal intelligence, but some may experience learning difficulties.

information about the foetus' condition – the applicant appealed in the last instance to the Human Rights Court. The applicant submitted that the public powers' failure to implement laws and regulations governing access to prenatal examinations, the lack of procedures to ensure whether the conditions for a lawful abortion had been met, and the failure to implement and oversee the laws governing the practice of conscientious objection, resulted in a violation of her Article 8 rights.¹²⁶

The Court concurred with the applicant and found that Poland had been in breach of Article 8 of the Convention. Drawing from *Tysiaç v Poland*¹²⁷ and in tune with the autonomy-based practice now developing under Article 8, the Court highlighted the importance of the existence of an effective procedural framework to guarantee that “relevant, full and reliable information on the foetus' health is available to pregnant women.”¹²⁸ As to the content of these procedural provisions, the Human Rights Court gave the responding State the following guidelines: a proper procedural framework should be in place to address and resolve controversies arising in connection with the availability of lawful abortion. A pregnant woman should be able to invoke a review of a medical decision – at a minimum she should be heard in person and her views should be taken into account;¹²⁹ the procedures should guarantee an individual effective access to information about the condition of his or her health; and the procedures in place should also ensure that decisions to give pregnant women referral to genetic testing are taken in good time.¹³⁰ Neither the administrative nor civil law remedies, relied on by the Government, were considered sufficient to provide appropriate protection of the autonomy rights of a pregnant woman.¹³¹ As to the question about conscientious objection, raised by the applicant, the Court stressed that the States should organise the health service system in such a way that the health care professionals' exercise of freedom of conscience does not prevent patients from obtaining access to services to which they are entitled.¹³²

¹²⁶ *R.R. v Poland*, para 170-177.

¹²⁷ *Tysiaç v Poland*

¹²⁸ *R.R. v Poland*, para 200.

¹²⁹ *R.R. v Poland*, para 191 and 195.

¹³⁰ *R.R. v Poland*, para 197.

¹³¹ *R.R. v Poland*, para 210.

¹³² *R.R. v Poland*, para 206.

There is little doubt that in this particular case the applicant's trust towards medical personnel was not adequately met. From the moment that there was indication that the child the applicant was carrying might be suffering from some form of malformation, she was subjected to disrespectful and incompetent treatment, "marred by procrastination, confusion and lack of proper counselling."¹³³ She was "shabbily treated" and "humiliated", as the Human Rights Court's judgment says.¹³⁴

Looking at these instances of untrustworthy action on the part of the medical professionals it may seem prudent to take a stance of distrust rather than trust towards the clinicians. In order to enhance "trustworthy" action and reduce uncertainty as to the patient's situation, according to the Human Rights Court, more robust legislative procedures needed to be introduced. This, despite the fact that there were several legal regulations in Poland in force already that set the standards for good medical practice and that provided obligations for medical professionals to give patients comprehensible information about their conditions, the diagnosis, the proposed and possible diagnostic and therapeutic methods, the foreseeable consequences of a decision to have a recourse to them or not, the possible results of the therapy and about the prognosis.¹³⁵ The doctors' behaviour was found in violation with these standards by the Polish Supreme Court as well as by the Human Rights Court. Was more regulation really needed? Some regulations, as I argue, may backfire, and instead of reducing distrust, they may contribute to its intensification. Efforts to improve the performance of medical professionals can backfire by conveying to the public an attitude of distrust and by reducing medical actors' motivations to behave in a trustworthy fashion.

4.4.2.2 Doctors do not deserve trust

My worry here is that the unreflective adoption of measures that aim to increase one's individual autonomy – additional control and complaints systems and appeal mechanisms – increasingly suggest to doctors, or any other professionals for that

¹³³ *R.R. v Poland*, para 153.

¹³⁴ *R.R. v Poland*, para 160.

¹³⁵ The regulation in question included relevant clauses of the Polish Constitution, the Family Planning Act, the Medical Profession Act, the Medical Institutions Act, and the Civil Code.

matter, that they are not trusted and that they are not expected to act on the basis of trustworthy motivations. This may trigger a wider culture of distrust, low morale, and may lead to professional stagnation. Simultaneously, and I would assume contrary to general expectations, they rather limit the trusting person's autonomy, who is now "empowered" to take charge in his or her medical situation and the conduct of it. This empowerment might, however, be more illusory than real if the relationships, which are crucial to self-development and flourishing of autonomy are, in fact, undermined. This is especially questionable in the light of the Court's emphasis on the vulnerability of the pregnant woman's position.¹³⁶

The argument presented here rests on the widely endorsed premise that the trust of others is of fundamental value to most of us. As MacCormick and Mitchell both point out, it was Adam Smith who observed that a very common human characteristic is a wish both to be trusted and to be worthy of trust.¹³⁷ Picking up on that, several authors writing on trust argue that trust develops in reciprocal fashion: trusted parties respond to cues they receive about how they are expected to behave.¹³⁸ Correspondingly, conferring trust has an effect in that it improves the motivation and behaviour of the parties who perceive that they are trusted.¹³⁹ If people receive signals that they are trusted, they are more likely to live up to the expectation and become more trustworthy overall. As Mitchell argues, it is the moral psychology of being trusted itself that helps to create trustworthiness in people.¹⁴⁰ In this way, trusting may make the trusted trustworthy.

Contrariwise, if people receive signals that they are not trustworthy, they are likely to become less trustworthy. Those who (correctly) view themselves as trustworthy and competent may feel undermined by social practices that query their trustworthiness, or that demonstrate mistrust by imposing excessive forms of assessment, review and

¹³⁶ *R.R. v Poland*, para 209.

¹³⁷ N. MacCormick, note 77 above, at 77; L.E. Mitchell, note 21 above, at 613.

¹³⁸ M.B. Blair and L.A. Stout, note 27 above, at 1766.

¹³⁹ M.A. Hall, note 18 above, at 510; Dasgupta argues similarly that "the mere fact that someone has placed his trust in us makes us feel obligated, and this makes it harder to betray that trust." See Dasgupta, note 17 above, at 53.

¹⁴⁰ L.E. Mitchell, note 21 above, at 599; See also R.C. Solomon, F. Flores, note 23 above, at 33, arguing that trust indicates respect and it is psychologically gratifying to be trusted.

monitoring.¹⁴¹ If more regulation sets very specific guidelines on one's profession, it has the risk of reducing the profession into mere targets prescribed by procedures and requirements. It runs the risk of producing compliance only with the precise scope of the law and only to the extent of actual enforcement, rather than a more global or inner ethic that reciprocates trust with trustworthy behaviour.¹⁴² As O'Neill argues: "Each profession has its proper aim, and this aim is not reducible to meeting set targets following prescribed procedures and requirements."¹⁴³ She further contends that "the new accountability is widely experienced not just as changing but as distorting the proper aims of professional practice and indeed as damaging professional pride and integrity."¹⁴⁴ I believe she is right. Distrust has the potential to provoke resentment, alienation and suspicion on the part of the person mistrusted. Doctors who are loaded with record-keeping and busy with avoiding complaints – a threat, even if not put in practice, created by the added appeal and complaints mechanisms – are prone to taking a defiant and hostile approach towards their patients. Cynical views even claim that by incorporating informed consent into medical practice the responsibility shifts to the patient and this provides the physicians a potent tactic to combat malpractice suits.¹⁴⁵

An apparent increase in informed consent can then be seen as rather serving to reduce the obligations of health care providers than to protect the interests of patients. From this perspective, law has substituted a formal requirement of openness for a substantive one of protection. The legal doctrine of informed consent, understood in this way, undermines autonomy because it reduces the moral obligation of health care providers to protect the ability of patients to shape their own lives.¹⁴⁶ To put it another way, it may give neat justification for physicians to "off-load" hard decisions to their patients.¹⁴⁷ As Montgomery argues, consent in the hands of certain legal advisors is not about promoting the moral value of autonomy, but about removing the need for health care professionals to take responsibility for

¹⁴¹ N.C. Manson, O. O'Neill, note 14 above, at 161.

¹⁴² Ibid.

¹⁴³ O. O'Neill, note 1 above, at 49.

¹⁴⁴ Ibid.

¹⁴⁵ P.R. Wolpe, note 42 above, at 52.

¹⁴⁶ J. Montgomery, note 57 above, at 188.

¹⁴⁷ J.D. Moreno, note 43 above, at 415.

treatment being in the interests of their patients by transferring that responsibility to the patients. The moral value of autonomy is not, in fact, promoted, and the moral purpose of healthcare is obscured.¹⁴⁸

Furthermore, since the added legislative measures in *R.R.* did not impose any additional professional requirements for the doctors, but they were rather encouraged to empower the patients, this may provide incentives for a different sort of unprofessional conduct. In order to avoid lengthy legal battles or to deal with distrustful patients, the doctors may willingly transfer the responsibility for treatment into the hands of patients. The tired and overworked doctor is likely to welcome the patient who autonomously refuses treatment.¹⁴⁹ For instance, as commentators have noted, it may “lead some doctors to consider mistakenly that unthinking acquiescence to a requested intervention against their clinical judgment is honouring “patient autonomy” when it is, in fact, abrogation of their duties as doctors.”¹⁵⁰ In other words, certain devices that aim to protect the interests of patients and their individual autonomy may inadvertently reduce the moral obligations of health care providers.

Finally, even if the Court’s intentions were to provide patients with a strong sense of security towards the actions of the doctors, this is not to eliminate the risks involved in trust. These regulations just shift the target of trust from being towards doctors and instead towards the functioning of the systems that control and secure their reliable performance.¹⁵¹ From the point of view of both patients and doctors, this would hardly be a helpful or a desirable outcome.

4.4.3 Betrayal of trust

Since trust always entails some level of uncertainty and risk, there is always a possibility of betrayal. Not all betrayals are equal, however. There are instances of breaking trust, which are considered mere disappointments, which do not involve

¹⁴⁸ J. Montgomery, note 42 above, at 189.

¹⁴⁹ I owe thanks to Prof Mason for this comment.

¹⁵⁰ G.M. Stirrat, R. Gill, “Autonomy in Medical Ethics after O’Neill”, (2005) 31 *Journal of Medical Ethics* 127-130, at 127; See also J.D. Moreno, note 43 above, at 415-416.

¹⁵¹ N.C. Manson, O. O’Neill, note 14 above, at 163.

blame. But there are also blameworthy acts that are considered real breaches of trust. One of widely considered blameworthy breaches of trust is lying. Indeed, by some standards it is the ultimate breach of trust.¹⁵²

Addressing trust under the ECtHR jurisprudence involves, therefore, not seeing whether the Court has openly and directly tried to achieve trust or any particular benefit from it, but rather in looking into the attitude the Court has taken towards breaking trust. This means, above all, exploring the approaches the Court has taken towards deceiving, lying and breaking promises. For this purposes I will use again the already familiar case from previous chapters, *Evans v the United Kingdom*,¹⁵³ to showcase and argue that as the law stands at the moment it does not condemn the acts that break trust, but rather acts as a social incentive to deceive

4.4.3.1 Broken promises and untruthfulness

After the delivery of the judgment in *Evans* there was an intuitive public empathy with Ms Evans.¹⁵⁴ Commentators qualified the case as a “human tragedy”,¹⁵⁵ and as a “desperately sad outcome for Ms Evans”.¹⁵⁶ They felt sympathy for Ms Evans and they felt that she had been given assurances and promises that should have been kept. Even if everything seemed correct formally and legally, there was still something unsatisfactory about the whole outcome of the case.¹⁵⁷

What then did Mr Johnston do exactly that seemed for many so wrong? He was clearly concerned to support his partner, who had just found out that she had cancer in both of her ovaries and that her chances of having the genetic child she so desperately desired was suddenly drastically reduced. He had told Ms Evans that he

¹⁵² R.C. Solomon, F. Flores, note 23 above, at 134.

¹⁵³ Case of *Evans v the United Kingdom* (App.6339/05), Judgment of 10 April 2007.

¹⁵⁴ See e.g. BBC News, “Woman loses frozen embryos fight”, 7 March 2006, available at: <http://news.bbc.co.uk/1/hi/4779876.stm>.

¹⁵⁵ A. Bomhof, L. Zucca, “The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights”, (2006) 2 *European Constitutional Law Review* 424-442, at 427.

¹⁵⁶ K. Wright, “Competing Interests in Reproduction: The Case of Natallie Evans”, (2008) 19 *King's Law Journal* 135-150, at 150.

¹⁵⁷ See J.K. Mason, “Discord and Disposal of Embryos”, (2004) 8 *Edinburgh Law Review* 84-93; C. Lind, “Evans v United Kingdom – Judgment of Salomon: Power, Gender and Procreation”, (2006) 18 *Child and Family Law Quarterly* 576-592.

was not going to leave her and that he was going to be the father of her children.¹⁵⁸ He also knew that the relationship would have ended if he had told her that he was not going to give her the child she so desperately wanted.¹⁵⁹ More than that, he also knew that he could withdraw his consent any time before the implantation.¹⁶⁰ Was there any pressure then for him to give all these assurances and promises?¹⁶¹ Or, more significantly, would he have given the assurances and promises so easily if there were not the legal regulations in operation that allowed him to withdraw his consent to storage or use of the embryos?

Drawing from the statements Mr Johnston made to the trial judge, it seems indeed reasonable to assume that his decision to undertake the IVF with Ms Evans was influenced by his foreknowledge of the possibility to withdraw his consent any time before the implantation:

It was obviously made clear to us that the consent of both myself and Ms Evans would be required before anything could be done...It was clear...that we would still maintain freedom to choose either whether we wanted to start a family together or when we would start a family together. I suppose I was reassured by the fact that I would still maintain the same control regarding this decision as I would had [if] these unfortunate events [break-up of the relationship] [had] not occurred.¹⁶²

Was Mr Johnston effectively lying to Ms Evans? Is that the reason for the dissatisfaction expressed by several commentators to the case? Or was it that the law did not foresee the possibility or do anything to obviate the mischief?

According to MacCormick, to tell a lie is to address a false statement to another person knowing that it is false or not believing that it is true, or being reckless as to its truth or falsity.¹⁶³ The circumstances must be such that the other person regards the statement as being seriously made. The speaker must intend the statement

¹⁵⁸ *Evans v Amicus Healthcare Ltd and others*, [2003] EWHC 2161 (Fam), para 58.

¹⁵⁹ *Ibid.*, para 61.

¹⁶⁰ *Ibid.*, para 48.

¹⁶¹ See also S. Sheldon, "Revealing Cracks in the 'Twin Pillars'?", (2004) 16 *Child and Family Law Quarterly* 437-452. Sheldon notes that the quality of the consent procedures in *Evans* case was poor. The very constrained nature of consent envisaged by the HFEA, which involves highly structured choices made within the context of limited possibilities makes the primacy of the principle of consent underlying the legislation questionable.

¹⁶² *Evans v Amicus Healthcare Ltd and others*, [2003] EWHC 2161 (Fam), para 49.

¹⁶³ N. MacCormick, note 77 above, at 69

seriously, or at least realise that the addressee will reasonably assume that it is being made seriously.¹⁶⁴

To evaluate whether Mr Johnston's actions¹⁶⁵ indeed qualified as lying according to this definition is not just problematic merely because of the many subjective elements involved, but also, as was shown in the citation from Mr Johnston above, because the law itself sets the conditions for "being reckless," thus, leaving the truthfulness of your statement in limbo. The ability to withdraw one's consent at any time not only perpetuates states of uncertainty, but also potentially supports a lack of veracity and even outright dishonesty, since it allows people to claim that they have changed their minds regarding consent with little or no legal consequence.

Hence, the dissatisfaction there is with the law and how it stands at the moment, is that the structure of the legislature, underpinned by the primacy of informed consent and its flipside, the *absolute* right to refuse – which, in turn, is set to serve the protection of the individual's autonomy and independence – acts as a social incentive to deceive. Of course lying is an everyday matter, and unfortunately couples lie and give unsubstantiated promises to each other not so infrequently. I do not think that law should impose regulations or sanctions on every lie that happens in interpersonal relationships. Yet it is another matter to accept and propagate through (human rights) law, even if indirectly and inadvertently, readiness to deceive. A party with a certain level of motivation to betray for opportunistic reasons is more likely to act on that motivation when he or she perceives a low likelihood of suffering any penalties.¹⁶⁶ On my reading of the case, the Court acknowledged that promises, assurances and trust, in effect, given in private settings do not count, since "legal" possibilities for deceit in the form of a formal consent form was written into the law.¹⁶⁷ This kind of

¹⁶⁴ Ibid.

¹⁶⁵ Although the trial judge emphasised that Mr Johnston did not give any clear and unequivocal assurances as to the use of embryos nor a promise that he would never withdraw his consent to their use, I would agree with Prof MacCormick and S. Bok that one can be deceived also by ruses and gestures, through disguise or even through silence, not only by false statements. See N. MacCormick, note 77 above, at 69 and S. Bok, *Lying: Moral Choice in Public and Private Life*, Vintage Books, 1989, at 13.

¹⁶⁶ F.B. Cross, note 29 above, at 1466-1467.

¹⁶⁷ At least one of the commentators to the case seemed to share the same concern. In Prof J.K. Mason's words one cannot but intuitively question whether a law which positively, albeit coincidentally, encourages what might well be less than honourable conduct is a good law. See J.K.

legal endorsement of individualistic autonomy in the end does not only say that we need not sacrifice ourselves for other people, but it makes it also more acceptable to say that we need not concern ourselves when we make other people unhappy. It certainly influences the functioning of trust. It reveals yet another aspect of individual autonomy's incapacity to support trust through existing mechanisms.

4.4.3.2 Trust and deception

The premise that deceit and/or the breaking of promises destroy trust seems rather uncontroversial. Many of our choices depend on our estimates of what will be the outcome of the decision.¹⁶⁸ These expectations must in turn often rely on information from others. Each person has authority concerning his or her future conduct, to the extent that our conduct is a matter of our own free discretion. Somebody who has authority over his or her own future conduct is in a position to undertake various sorts of commitment, both unilateral and bilateral, towards others. Those others may place trust in assurances about the commitment undertaken.¹⁶⁹ (In that sense Mr Johnston enjoyed informational authority over Ms Evans concerning his feelings, his hesitations and his willingness to become the father of her child. The exercise of such authority engaged trust, which turned out to be misplaced.) The receiver of the information has to proceed on the basis of trust, at least for the moment, since she has no information base of her own on the basis of which to check the honesty of the information. Depending on the circumstances and relationships under question, there is sometimes time and possibilities to confirm the information received. But in the first instance, the most reasonable course of action is to trust the person on the basis of presumed authority and on the footing that people are more often than not truthful.

Mason, note 157 above, at 88. Also see a recent analysis by A. Mullock about how the *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* that sets out determining factors for potential culpability in encouraging or assisting suicide acts as an endorsement of compassionate assisted suicide. The Regulations were followed by the decision of the House of Lords in the case of *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL, [2009] WLR 403, and their ruling that the Article 8 rights of the ECHR entitle Mrs Purdy to be provided with guidance from the DPP as to how he proposes to exercise his discretion under section 2(4) of the 1961 (Suicide) Act. See A. Mullock, "Overlooking the Criminally Compassionate: What are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?", (2010) 18 *Medical Law Review* 442-470.

¹⁶⁸ S. Bok, note 165 above, at 19.

¹⁶⁹ N. McCormick, note 77 above, at 73.

Deceit in this setting thus involves betrayal of trust by way of abuse of informational authority.¹⁷⁰

Legislation or its underlying principle that allows a person to renege on commitments whenever one chooses provides no basis for trust.¹⁷¹ This would make it difficult to see how anyone could come to be considered a trustworthy source of information, since trust could never be confidently placed by anyone in any other person. Commitments of any serious kind would wither, or never come into existence, in such a society. Co-operative activity and collaboration among individuals would be at best fragile.¹⁷²

Similar to the accord among the academics that trust is a valuable social good, there is an agreement that trust belongs with relationships and it can thrive only on a foundation of respect for veracity.¹⁷³ Based on *Evans*, and on what has been said on previous pages, the concept of autonomy may well act in a counterproductive way on both accounts.

Also, Ms Evans' relevant alternatives of choice and action were eliminated by Mr Johnston's lying. Relying on his assurances that he loved her and wanted to be the father of her children, she "put all her trust in him, and did not look for alternative treatment – e.g. egg freezing or the use of donor sperm."¹⁷⁴

Since autonomy as conceived under the ECHR largely ignores relationships, denies mutual dependency and praises purely self-regarding independence (e.g. Ms Evans was driven to have her own baby and Mr Johnston wanted to be in control over whether to, when and with whom to have children), the findings by the trial judge, Wall J, concerning the insignificance of Mr Johnston's assurances, seem to be in accord with the main idea of individual autonomy.

According to Wall J, Ms Evans was not so much relying on Mr Johnston's assurances as taking the only realistic course of action open to her.¹⁷⁵ Egg freezing

¹⁷⁰ See N. MacCormick, note 77 above, at 71.

¹⁷¹ See N. MacCormick, note 77 above, at 73.

¹⁷² See N. MacCormick, note 77 above, at 73.

¹⁷³ S. Bok, note 165 above, at 249.

¹⁷⁴ *Evans v Amicus Healthcare Ltd and others*, [2003] EWHC 2161 (Fam), para 58.

¹⁷⁵ *Ibid.*, see para 309.

and donor sperm were not very realistic courses of action for Ms Evans; hence in the opinion of Wall J, she would have gone ahead with the IVF treatment with Mr Johnston in any event – thus precluding a successful action of negligence.

In the end, analyses of the case imply that trust did not play a factor in either of the parties' decisions. Yet, if we are to take the importance of trust seriously, decisions made on the basis of trust need to be better protected.

The laws and rules in our society must be examined from the point of view of whether they encourage deception needlessly. Some regulations put great pressure on individuals to deceive, e.g. in order to continue to receive welfare payments, or to be allowed to have a divorce in societies with very strict rules against divorce.¹⁷⁶ Bok draws an insightful correlation between individualism and deception. She argues that the very stress on individualism, on competition, on achieving material success, which so marks our society, also generates intense pressure to cut corners. Motives such as to win an election, to increase one's income, to outsell competitors, impel many to participate in forms of duplicity they might otherwise resist. According to Bok, the more widespread people judge these practices to be, the stronger will be the pressure to join, and even compete, in deviousness.¹⁷⁷ But the more important it should be for a public institution as powerful as the ECtHR to attempt to alter the existing pressures and incentives to deceit, by curbing high praise for independence and individualistic cultures in order to curtail the prevailing mistrust by people towards one another. As Bok says:

The social incentives to deceit are at present very powerful; the control often weak. Many individuals feel caught up in practices they cannot change. It would be wishful thinking, therefore, to expect individuals to bring about major changes in the collective practices of deceit by themselves. Public and private institutions, with their enormous power to affect personal choice, must help alter the existing pressures and incentives.¹⁷⁸

¹⁷⁶ S. Bok, note 165 above, at 245.

¹⁷⁷ *Ibid.*, at 244.

¹⁷⁸ *Ibid.*

4.5. Conclusion

We are all unique individuals living in a world of others. Whatever is done for one person inevitably has implications for others. There are no such completely self-determining individuals who are not influenced by or dependent on others in their personal and social world. Interaction and dependence requires some measure of trust, and law is one mechanism that can support trust in society. Understanding what triggers and maintains trust in order to appropriately design such law mechanisms is therefore of utmost importance.

While trust cannot be directly willed, we can pay attention to the kind of things that are likely to support, create, or extend our trust, and we can will ourselves to refrain from focusing on the kinds of things that are likely to undermine or limit our trust.¹⁷⁹

Once the trust culture emerges and becomes strongly rooted in the normative system of a society, it becomes a powerful factor influencing decisions to trust, as well as decisions to meet or to reciprocate trust taken by many agents, in various social roles, and in many institutions.¹⁸⁰

The problem with individual autonomy and the particular approach taken by the European Court of Human Rights is that it imports the mechanisms of enhancing trustworthiness, and hence, the value of trust, in a manner suitable in economic impersonal relationships rather than in noneconomic and personal ones. As a consequence, the particular construction of autonomy starts with the premise that distrust rather than trust is the factual basis or reality of contemporary relationships. An unforeseen and unexpected consequence of this approach is that the ECtHR does not engage in building trust, but it encourages distrust. And distrust only feeds more distrust.

Further, introducing more accountability measures to guarantee individual autonomy potentially causes the reduction of trust since these measures reduce the internal motivations of professionals, such as doctors, for trustworthy action. If people receive signals that they are not trustworthy, they are likely to become less

¹⁷⁹ K. Jones, note 61 above, at 22.

¹⁸⁰ P. Sztompka, note 2 above, at 68.

trustworthy. Finally, the approach the Court has taken towards breaches of trust – deception, lying and the breaking of promises – is wanting. The way law stands at the moment under the regulations of individual autonomy acts as a social incentive to deceive, and is therefore not conducive to trust.

Trust is socially valuable and thus institutions should encourage it. Therefore an account of autonomy is needed that helps to enhance trusting and trustworthiness, and thus helps to support or induce trust. In response to this need, the final chapter develops an account of caring autonomy for the moral basis of the practice of trust.

CHAPTER 5

CARING AUTONOMY

5.1. Introduction

Under the conditions of individualisation, the role of trust in modern Western society is significant and increasing (Chapter 3). Moreover, if the new individualism of the 21st century is to thrive, and nothing indicates otherwise, “trust cannot be seen any more as an automatic by-product of macro-social or macro-economic processes, but rather it needs to be perceived as an active political accomplishment.”¹ Bolstering trust has to become an effort within the human rights project that values autonomy and regards the strengthening of interrelationships as crucial for human well-being. As was argued in the previous chapter, it is the existence of trusting relationships that enable individuals to flourish and develop capacities that make life valuable.

The previous chapter found that individual autonomy, as interpreted by the Human Rights Court in its Article 8 jurisprudence, is inadequate for supporting trust in personal relationships – e.g. doctor-patient relationships or intimate relationships within a family setting. It was argued that individual autonomy rather has the potential effect of undermining trust in these contexts and relationships. An individualistic concept of autonomy takes a protective stance towards others and starts with the premise of distrust and goes on to reinforce it. Individual autonomy that emphasises the values of being independent and self-sufficient gives less reason to believe that people will behave solicitously, attentively and caringly towards others. In other words, while respect for individual autonomy does not require hurting others, it does not prompt a positive move towards others: it falls short of encouraging care and concern about others.

¹ B.A. Misztal, *Trust in Modern Societies*, Polity Press, 1996, at 7.

Yet for trust to outweigh distrust, our beliefs, attitudes or expectations concerning the likelihood that the actions of others will be acceptable or will serve our interests, need to be mostly optimistic.² Following Hall, trust is the “*optimistic acceptance of a vulnerable situation in which the truster believes the trustee will care for the truster’s interests [Emphasis added]*”.³ Trust, therefore, is based on positive expectations that another person behaves in a responsible and caring way, and will continue to do so.⁴ Behaving in a caring way helps to build trust and mutual concern and connectedness between persons. In order to cultivate trust, we need to cultivate caring.⁵

The present chapter proposes that in order to cultivate practices of trust, to enhance social cohesion and to strengthen trustworthiness in interpersonal relationships, the European Court of Human Rights should take the approach of advocating the language of caring autonomy – a concept of autonomy informed by the insights of the ethics of care.

The chapter proceeds in the following way. I start by giving a brief explanation of the essential features of the ethics of care and address, thereafter, some of the main criticisms that have questioned its desirability and usefulness in solving ethically sensitive dilemmas and providing a basis for legal analysis. In this way I hope to anticipate some of the potential concerns that the applicability of caring autonomy might have in the setting of the European human rights adjudication.

Next, I propose a definition of caring autonomy fit for the purpose of strengthening trust in interpersonal relationships. Building on the works of care ethicists, my concept of caring autonomy is based on the idea that we are both unique, autonomous individuals and at the same time embedded in nested dependencies. It

² M.B. Blair, L.A. Stout, “Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law”, (2001) 149 *University of Pennsylvania Law Review* 1735-1810, at 1739-1740; See also D. Good “Individuals, Interpersonal Relations and Trust”, in D. Gambetta (ed) *Trust. Making and Breaking Cooperative Relations*, Basil Blackwell, 1988, 31-48, at 33.

³ M.A. Hall, “Law, Medicine and Trust”, (2002) 55 *Stanford Law Review* 463-527, at 474; See also F.B. Cross, “Law and Trust”, (2005) 93 *Georgetown Law Journal* 1457-1545, at 1461: “[T]rust is the voluntary ceding of control over something valuable to another person or entity, based upon one’s faith in the ability and willingness of that person or entity to care for the valuable thing.”

⁴ See also R.C. Solomon, F. Flores, *Building Trust in Business, Politics, Relationships, and Life*, OUP, 2001, at 24: “To trust people is to count on their sense of responsibility, believing that they will choose to act in a trustworthy manner.”

⁵ A. Baier, “Trust and Antitrust”, (1986) 96(2) *Ethics* 231-260; K. Jones, “Trust as an Affective Attitude”, (1996) 107(1) *Ethics* 4-25.

sees free choice and moral obligations and responsibility as complementary to each other and thus mutually interdependent.⁶ Characteristics of independence, assertiveness and flexibility are all necessary elements of autonomous decision-making, but they cannot be the only ones, nor the dominant ones. Caring autonomy regards equally and highly, the qualities of attentiveness, responsiveness and empathy in autonomous decision-making.

Finally, I will address the question of the implementation of caring autonomy by the European Court of Human Rights. I will go back to the very beginning of this thesis and revisit the case of *Pretty v United Kingdom* – the case that arguably introduced individual autonomy into the Human Rights case law. My aim is to reconstruct the reasoning of this case in terms of caring autonomy to demonstrate how a different and more justifiable outcome would be possible on my reconceptualisation of the core values and interests at stake.

In the end I hope to have demonstrated that adopting the care perspective under the Article 8 jurisprudence allows us to move towards a more trusting and caring humane society.

5.2. The ethics of care and some concerns about its use and usefulness in the human rights discourse

The concept of autonomy I propose in this chapter – caring autonomy – that is designed to substitute individual autonomy as an underlying value for interpretation of Article 8 jurisprudence, has its roots in the ethics of care: a moral and political theory based upon caring.⁷ Although the literature on the ethics of care has grown considerably over the past twenty years or so,⁸ with numerous scholars expanding

⁶ A.I. Tauber, “Sick Autonomy”, (2003) 46(4) *Perspectives in Biology and Medicine* 484-495, at 490.

⁷ The foundations for the ethics of care was laid by C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press, 1982; and N. Noddings, *Caring: A Feminine Approach to Ethics and Moral Education*, University of California Press, 1984.

⁸ J.C. Tronto, *Moral Boundaries. A Political Argument for an Ethic of Care*, Routledge, 1993; G. Clement, *Care, Autonomy, and Justice: Feminism and the Ethics of Care*, Westview Press, 1996; V. Held, *The Ethics of Care: Personal Political and Global*, OUP, 2006; M. Slote, *The Ethics of Care and Empathy*, Routledge, 2007; D. Engster, *The Heart of Justice: Care Ethics and Political Theory*, OUP, 2007.

the ideas of what it means to care for others and how care might be integrated into areas as diverse as international law and terrorism⁹ and healthcare law,¹⁰ the ethics of care has, nevertheless, remained outside much of the mainstream attention. Its use in human rights discourse has been almost non-existent and has been invisible to many.¹¹ Therefore, before proposing my understanding of the concept of caring autonomy and how the Human Rights Court could implement it, I think it would be helpful to start by summarising the key aspects of the care perspective, and thereafter, review some of the possible objections to its use and usefulness in the human rights framework. There might be good reasons why the care perspective has not been considered relevant for human rights adjudication. I will address these before going on to make my case for the role and relevance of ethics of care in this context.

5.2.1 What is the ethics of care?

The ethics of care originates from Carol Gilligan's seminal book *In a Different Voice: Psychological Theory and Women's Development*¹² where she claimed, very broadly, that women tend to think of moral issues in terms of emotionally involved caring for others and connection to others, whereas most men see things in terms of autonomy from others and the just and rational application of rules or principles to

⁹ V. Held, "Military Intervention and the Ethics of Care", (2008) 46 *The Southern Journal of Philosophy* 1-20; V. Held, "Can the Ethics of Care Handle Violence?", (2010) 4(2) *Ethics and Social Welfare* 115-129.

¹⁰ J. Herring, "Where are the Carers in Healthcare Law and Ethics?", (2007) 27(1) *Legal Studies* 51-73; R. Gillon, "Caring, Men and Women, Nurses and Doctors, and Health Care Ethics", (1992) 18 *Journal of Medical Ethics* 171-172; C. Gastmans et al., "Nursing Considered as Moral Practice: A Philosophical-Ethical Interpretation of Nursing", (1998) 8(1) *Kennedy Institute of Ethics Journal* 43-69; For an argument rejecting the usefulness of the ethics of care in healthcare settings see P. Allmark, "Can There Be an Ethics of Care?", (1995) 21 *Journal of Medical Ethics* 19-24.

¹¹ For an exception see J. Spring, "On the Rescuing of Rights in Feminist Ethics: A Critical Assessment of Virginia Held's Transformative Strategy", (2011) 3(1) *Praxis* 66-83, arguing for the importance of developing an approach that integrates rights and care rather than seeing rights as juxtaposed with the commitments of care. For a discussion between the relationships of rights and care ethics more broadly see J. Kroeger-Mappes, "The Ethics of Care Vis-à-vis the Ethics of Rights: A Problem for Contemporary Moral Theory", (1994) 9(3) *Hypatia* 108-131; D. Engster, "Care Ethics and Natural Law Theory: Toward an Institutional Political Theory of Caring", (2004) 66(1) *The Journal of Politics* 113-135.

¹² C. Gilligan, note 7 above.

problem situations.¹³ Since then, many, mostly feminist, philosophers have developed Gilligan's ideas further to advance towards a general body of thought based on the notion of caring and how caring can offer new insights for rethinking in more fruitful ways how we ought to guide our lives.¹⁴ Whereas originally, the ethics of care was starkly contrasted with justice theories, such that each ethic focused on one dimension of human relationships,¹⁵ the more recent works have disregarded this opposition.¹⁶ Instead, the aim has been to work towards integrating the ethics of justice and the ethics of care into a uniform account of moral reasoning, without neglecting one or the other.¹⁷ As I see it, the importance of the ethics of care is that it emphasises aspects of moral reasoning that are not generally emphasised by dominant moral thought, but which are, nevertheless, essential dimensions of human life and ethics. For the present purposes, the ethics of care, then, provides useful and important insights for how to enrich the concept of autonomy, rather than neglecting it altogether.

What are the essential features of the ethics of care? At the core of the ethics of care is the understanding that care constitutes an important and essential component of moral thinking, attitude and behaviour. The ethics of care recognises that human beings are dependent on each other in many ways and for most of the time of their lives. It sees persons essentially as relational and interdependent rather than self-sufficient and independent.¹⁸ All persons need care for at least their early years, during times of sickness, disability and frail old age. But even during times of relative health and vigour, most of us rely on others to help us and meet our needs. The prospects for human flourishing hinge fundamentally on the idea that those needing care thereby receive it. The care ethicists argue that because of this universal dependence upon one another for care, we all have moral obligations to care for

¹³ One the reasons why Gilligan's work had far-reaching impact on feminist thought, but also why it led to impasse see M. Drakolpoulou, "The Ethics of Care, Female Subjectivity, and Feminist Legal Scholarship", (2000) 8 *Feminist Legal Studies* 199-228.

¹⁴ See footnote 8 above.

¹⁵ C. Gilligan, note 7 above; N. Noddings, note 7 above.

¹⁶ D. Engster, note 8 above; G. Clement, note 8 above.

¹⁷ G. Clement, note 8 above.

¹⁸ V. Held, note 8 above, at 46; C. Clement, note 8 above, at 13; S. Sevenhuijsen, "Caring in the Third Way: The Relation Between Obligation, Responsibility and Care in Third Way Discourse", (2000) 20(1) *Critical Social Policy* 5-37, at 9.

others in need.¹⁹ The care perspective involves seeing oneself as connected to others within a web of various relationships and attending to and meeting the needs of the particular others for whom we take responsibility.²⁰

The priority of the ethics of care can be said then to lie in two interrelated aspects: in taking relationships as fundamental and valuing their maintenance, and in developing moral injunctions to protect these relationships and meeting the needs of those to whom one is connected.²¹ As Orend notes:

Care for others means sympathising with them and supporting them, helping them develop their skills, being committed to a personal connection with them based on trust and mutual respect, taking on responsibility to do what one can to ensure their well-being.²²

To put it another way, the ethics of care takes the idea of self-in-relationship as a point of entry for thinking about responsibility and obligation. While the moral subject in the discourse of individual rights looks at situations of moral dilemma from the stance of the “highest principles” and takes rights and obligations as a means of establishing relationships, the moral subject in the discourse of care always already lives in a network of relationships, in which she or he has to find balances between different forms of responsibility – for the self, for others and for the relationships between them.²³ Grace Clement illustrates this point by referring to the case of a couple, who decides to have a child. As she points out, this voluntary decision would seem to ground the couple’s obligations toward the child they create. However, the child is born with severe mental and physical disabilities. Assuming that the parents have some obligations toward their disabled child, Clement argues that these obligations should not be understood in terms of consent, as the parents never consented to the situation in which they have found themselves. Rather the parents recognise an obligation that they have not explicitly chosen.²⁴

¹⁹ V. Held, note 8 above; D. Engster, note 8 above.

²⁰ V. Held, note 8 above, at 10.

²¹ G. Clement, note 8 above, at 13-14.

²² B. Orend, *Human Rights: Concept and Context*, Broadview Press, 2002, at 173.

²³ S. Sevenhuijsen, note 18 above, at 10.

²⁴ G. Clement, note 8 above, at 13.

Another core element of the ethics of care is its emphasis on the concrete and particular. Rather than approaching moral questions solely in terms of abstract principles, utility or other universal ideals, care ethics aims to meet the concrete needs of individuals in context-specific and responsive ways. What the ethics of care advocates is the pattern of thinking in terms of “contextual and narrative” rather than formal and abstract.”²⁵ Whereas in the latter case the moral problem is abstracted from the interpersonal situation, the former case “invokes a narrative of relationships that extends over time.”²⁶ As Benhabib further explains “the standpoint of the concrete other...requires us to view each and every rational being as an individual with a concrete history, identity and affective-emotional constitution.”²⁷ Moral deliberation in terms of ethics of care thus involves paying attention to the concrete individual, and appreciating the context of the relationships in which she or he exists. For example, rather than abstracting from a person’s individuating features, using the ethics of care we make moral decisions on the basis of these features.²⁸ Considering who has the right over frozen embryos in case of a conflict between the parties involved, the ethics of care would guide us to pay attention to the particular circumstances of the relationship – what is at stake for each of the parties, what was promised from one party to the other before the relationship ended etc. From the justice perspective, it can be argued, that these sorts of details are unnecessary: the question is what was consented on the formal contract for medical treatment.

A number of criticisms have been launched against the ethics of care that can be perceived as questioning its suitability and usefulness in the human rights discourse. Because of the features of the ethics of care, outlined above, some of the critics would argue that it is impossible, immoral or unhelpful to use the insights of the ethics of care in human rights law. In a word, it would be a bad argument to advocate for the adoption of the care perspective in human rights law, despite its potentially positive effect on inducing trust in interpersonal relationships. These criticisms

²⁵ M.U. Walker, “Moral Understandings: Alternative ‘Epistemology’ for a Feminist Ethics”, (1989) 4(2) *Hypatia* 15-28, at 17-18.

²⁶ M.U. Walker, note 25 above, at 18.

²⁷ S. Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, Polity Press, 1992, at 159.

²⁸ G. Clement, note 8 above, at 12.

include: a) because of its attention to contextuality, the ethics of care is suited only to the private realm;²⁹ b) stemming from women's "voice", the ethics of care enforces women's self-sacrifice and enforces "slave morality";³⁰ c) through its dedication to maintaining relationships, caring devalues the individual at the cost of the relationship;³¹ d) caring is too vague a concept to provide proper guidance for decision-making in ethically sensitive judicial matters.³² As I argue, while pertinent to the early writings on the ethics of care, these criticisms have largely lost their relevance in the light of the more recent care theories. These criticisms are, nevertheless, instructive in deciphering those features of care that are helpful for constructing a concept of autonomy for the purposes of human rights protection.

5.2.2 The incompatibility of human rights adjudication and the ethics of care

Nel Noddings, whose work was one of the first to articulate an ethics of caring, provided a definition of care that necessarily entailed only a particular and situational morality.³³ Following directly from her definition of care, Noddings argues that caring cannot be taken as a model for general moral relations or as an institutional political theory.³⁴ For Noddings, caring occurs only in a circle of intimates and friends who are engrossed in one another.³⁵ Caring, according to Noddings, requires personal contact and varies according to individuals and situations. Indeed, because of this particularity, Noddings is wary of passing judgment on the caring activities of others. What is good for one individual in one situation may not be good for another individual in another situation. Care ethics does not, then, stipulate any substantive norms, but rather consists of an attitude of attending to others' wants and needs.³⁶

Following this concept of care, it might be thought that, although, the ethics of care can provide important insights into the moral values involved in the caring practices

²⁹ N. Noddings, note 7 above.

³⁰ S.L. Hoagland, "Some Concerns About Nel Noddings' Caring", (1990) 5(1) *Hypatia* 109-114.

³¹ V. Davion, "Autonomy, Integrity, and Care", (1993) 19(2) *Social Theory and Practice* 161-182.

³² E. Jackson, *Medical Law: Text, Cases and Materials*, OUP, 2006, at 22.

³³ N. Noddings, note 7 above.

³⁴ *Ibid.*, at 46-48.

³⁵ *Ibid.*

³⁶ *Ibid.*, at 13-14.

of family, friendship and personal care-giving, it has little to offer for the public sphere, including that of human rights adjudication. It could be argued that the contextuality of care limits it to situations about which we can know extensive details, and the evaluation of the latter is only possible in the context of personal relationships. In the present case a critic may ask, what has the ethics of care, the emphasis of which is on meeting the needs of the concrete individual in a particular relational context, to provide for the human rights adjudication, where the judges of the Human Rights Court can hardly know all the details and history of the claimants? Even the parties to the relationships whose cases are being considered under the Article 8 rubric are not always and necessarily intimate ones. More often, for example, the patients and doctors hardly know each other for longer than a 15-minute consultation time.

On the other hand, if care is perceived to vary according to individuals and situations so that it cannot provide any substantive norms for caring behaviour, my suggestion that adopting caring autonomy under the ECtHR Article 8 jurisprudence would induce people to behave in a more caring hence more trustworthy manner, would collapse.

More recent writings on care have argued, however, that care does not and should not limit itself to only intimate relations.³⁷ Otherwise, as Card argues, caring would render “as ethically insignificant our relationships with most people in the world, because we do not know them and never will.”³⁸ Tronto notes that given Noddings’ definition, care ethics “could quickly become a way to argue that everyone should cultivate one’s own garden and let other’s take care of themselves.”³⁹ According to Held, “the care that is valued by the ethics of care can – and to be justifiable must – include caring for distant others in an interdependent world, and caring that the rights of all are respected and their needs met.”⁴⁰

³⁷ J.C. Tronto, note 8 above; S. Schwarzenbach, “On Civic Friendship”, (1996) 107 *Ethics* 97-128; M. Slote, note 8 above, D. Engster, note 8 above.

³⁸ C. Card, “Caring and Evil”, (1990) 5(1) *Hypatia* 101-108, at 102.

³⁹ J.C. Tronto, note 8 above, at 103 and 171.

⁴⁰ V. Held, note 8 above, at 66.

This suggests that although the emphasis of the care perspective is on the contextual and concrete, it need not always be personal. In order to adequately care for someone, one must take that other person's concrete attributes and situation into account, but one need not therefore have a personal – however that is defined – relationship with him or her.⁴¹ Hence, the judges of the Human Rights Court need not know the parties personally in order to evaluate whether they are entitled to the caring treatment they argue for, or whether the applicants themselves have behaved in a caring way.

It can be argued that the possible incompatibility between care ethics and human rights adjudication rather rests on the different levels of emphasis they accord to concreteness and abstractness.⁴² The ethics of care focuses on the particularities of a situation because it recognises the dangers of applying general rules without regard for individuals and their specific needs. The justice perspective, on the other hand, concentrates on the general principles, which underlie our apparently dissimilar moral judgments, because it recognises the dangers of being so immersed in the context that one loses sight of one's principles and becomes inconsistent or relativistic.⁴³ However, it is hardly the case that either of the ethics is so straightforward in its operation. The European human rights adjudication has always paid attention to the contextual details of each case, and not just followed the reasoning in terms of abstract principles. In order to understand which general principles apply in a particular case, the Court must first pay attention to its contextual details. In this sense, general principles and contextual details are dependent upon one another. Deciding which principles are relevant and what priority to give them requires full attention to context.⁴⁴

Moreover, the Human Rights Court can have an important place in fostering caring relations and providing an institutional framework for perspectives and ways to see how people ought to live their lives to sustain and foster human flourishing. Rights can be fruitfully conceived as rules specifying what people should do in relation to

⁴¹ See also S.A. Schwarzenbach, note 37 above, at 121.

⁴² See also G. Clement, note 8 above, at 76.

⁴³ Ibid.

⁴⁴ Ibid., at 77.

one another, and as such, may be used to institutionalise the commitments of care. Positive rights, in particular, which are not limited to refraining from action, can bring the priorities of care to the public sphere by encouraging care and concern about others. With their power to alter, even if indirectly, the national legislations the Court can provide guidance on how the practices of care can be included in the legislation.

5.2.3 The ethics of care as an exclusively female morality

As noted above, the ethics of care rose to prominence with Carol Gilligan's *In a Different Voice*⁴⁵ that portrayed care ethics as a moral perspective closely associated with women's morality. Gilligan argued that women tend to approach morality from a different perspective from that of men – a perspective which accords moral primacy to caring within personal relationships. She noted the following:

The psychology of women that has consistently been described as distinctive in its greater orientation toward relationships and interdependence implies a more contextual mode of judgment and a different moral understanding. Given the differences in women's conceptions of self and morality, women bring to the life circle a different point of view and order human experience in terms of different priorities.⁴⁶

Drawing on her work, feminist theorists have since distinguished between a “male” approach to ethical issues, which focuses on abstract moral reasoning and on concepts of autonomy and justice, and a “female” approach to ethical issues, which focuses on particular needs, on relationships and concepts of care.⁴⁷ Although subsequent psychological research has found this correlation between care ethics and the mode of moral thinking most often used by women fairly weak,⁴⁸ the ethics of

⁴⁵ C. Gilligan, note 7 above.

⁴⁶ C. Gilligan, note 7 above, at 22.

⁴⁷ N. Noddings, note 7 above.

⁴⁸ A. Vikan et al., “Note on a Cross-Cultural Test of Gilligan's Ethic of Care”, (2005) 34(1) *Journal of Moral Education* 107-111; S. Jaffee, J.S. Hyde, “Gender Differences in Moral Orientation: A Meta-Analysis”, (2000) 126(6) *Psychological Bulletin* 703-726.

care still carries a kind of historical stigma as representing a distinctively feminine or gendered morality.⁴⁹

This association of the ethics of care to women's morality has provoked some of the critics to argue that the ethics of care amounts to a resuscitation of traditional stereotypes of women – stereotypes, which are used to rationalise the subordination of women. In this way, the critics argue, to pursue the feminine – the essence of which is dedication to relationships and meeting others' needs – is to pursue oppression.⁵⁰ Emily Jackson, for example, claims that the ethics of care is unsuitable for bioethical discourse since there is a “danger of reinforcing the stereotype that self-sacrifice and care come naturally to women, and by implication, that values such as justice do not.”⁵¹ Similarly O'Neill writes that “a stress on caring and relationships...may endorse relegation to the nursery and the kitchen, to purdah and to poverty. In rejecting 'abstract liberalism', such feminists converge with traditions that have excluded women from economic and public life.”⁵² As the critics point out, if the model of caring relations is based on work that women have been traditionally expected to do, work that has been part of their subjugation, then an ethics based on caring is a “slave morality.”⁵³ According to Puka, there is a danger with projecting women's care-taking strengths as valuable, since it “runs the risk of transforming victimisation into virtue”,⁵⁴ and “of legitimising subjugation to gender in a misguided attempt at self-affirmation.”⁵⁵

My, presumably feminist, critic may say that bringing the insights of the ethics of care to the human rights reasoning might not be, therefore, in the best interests of women, who have struggled hard to gain the recognition and rights to choose and control their own ways in life. Arguably, the adoption of the care perspective can

⁴⁹ For an analysis how this dichotomy between “male” and “female” morality is nothing “biological”, but socially and historically constructed, see J.C. Tronto, note 8 above, ch 2.

⁵⁰ S.L. Hoagland, note 30 above, at 112.

⁵¹ E. Jackson, note 32 above, at 22.

⁵² O. O'Neill, “Justice, Gender and International Boundaries”, in R. Attfield, B. Wilkins (eds) *International Justice and the Third World*, Routledge, 1992, 50-76, at 55.

⁵³ E.F. Kittay, “The Ethics of Care, Dependence, and Disability”, (2011) 24(1) *Ratio Juris* 49-58, at 53.

⁵⁴ B. Puka, “The Liberation of Caring: A Different Voice for Gilligan's ‘Different Voice’”, (1990) 5(1) *Hypatia* 58-82, at 58.

⁵⁵ B. Puka, note 54 above; See also C. Card, note 38 above, at 102.

potentially compromise the autonomy of the caregiver – e.g. women. Instead of continuing their “liberation”, women would take a step back towards their oppressive history.⁵⁶

I think the critics have undervalued the contribution the ethics of care can potentially make to the discourse of human rights, and eventually to the better conceptualisation and organisation of human relationships. What Gilligan said was that there is a different “voice” to that of the mainstream one. What she did not say is that these two “voices” or the two sorts of ethics are incompatible with each other.⁵⁷ I think the voice of the ethics of care needs to be heard because it can reveal values where there none was previously acknowledged. Part of the appeal to incorporate the insights of the ethics of care to the human rights reasoning is the expectation that all people, not just women, should act according to the values of caring.

Moreover, as Kittay argues, appreciating the values of care may prevent the newly empowered people from colluding with the very values that previously were used in their own subjection.⁵⁸ For example, as I argued in Chapter 2, the interpretation of autonomy by the Human Rights Court in cases pertaining to interpersonal relationships fosters a vision of a detached, independent and self-sufficient individual. Inadvertently, this “empowerment” of patients and women, for example, may cultivate the very same habits that previously belonged to that of the “privileged” group. Emphasis on respect for patient’s autonomy in medical setting, for example, is sometimes extended to an argument that patients must be given whatever they demand.⁵⁹

⁵⁶ C. Card, note 38 above; H. Kuhse, “Clinical Ethics and Nursing: ‘Yes’ to Caring, but ‘No’ to a Female Ethics of Care”, (1995) 9(3/4) *Bioethics* 207-219; J. Kroeger-Mappes, note 11 above, at 116.

⁵⁷ Similar point is made by R. Gillon, note 10 above.

⁵⁸ E.F. Kittay, note 53 above, at 54.

⁵⁹ See also M. Brazier, “Do No Harm – Do Patients Have Responsibilities Too?”, (2006) 65(2) *Cambridge Law Journal* 397-422. Brazier points out how patients’ lack of manners become evident when you walk around a clinic or a surgery in England and you will see notices of the kind unimagined 50 years ago. They state that patients who are violent or abusive to staff may be refused treatment. Telephone conversations may be recorded and abusive language used to receptionists may result in expulsion from the general practitioner’s list. (at 403)

5.2.4 Relationships subsume the individual

The ethics of care has been criticised for its failure to recognise absolute value in anything but caring.⁶⁰ The ethical ideal is about giving care and to maintain caring relations.⁶¹ Even if the importance of taking care of ourselves is noted, the moral basis for this is, arguably, to become better carers.⁶² Caring, according to these critics, is first and foremost an other-regarding activity that devalues the individual and his or her place in the relationship. Also, there is something deficient in a wholly other-regarding caring morality. By according little importance to caring for oneself, except perhaps as a means to provide further care for others, the model care-giver by that definition would seem to be rather a servant or slave.⁶³ If to consider that at the centre of the human rights project is the protection and well-being of the individual – which I do – then following the insights of the ethics of care might be considered counterintuitive for human rights discourse.

To get to the roots of this criticism we have to turn again to the work of Nel Noddings. One of the Noddings's central claims was that relations between human beings are ontologically basic. Therefore, she argued, caring relations are ethically basic. In order to be moral, according to Noddings, one must maintain oneself as caring: "We want to be moral in order to remain in the caring relationship and to enhance the ideal of ourselves as one-caring [that is as givers of care]. It is this ethical ideal...that guides us as we strive to meet the other morally."⁶⁴ So even in situations when I find it difficult to engage in caring action, I am under the obligation to do so if I want to be moral, that is to maintain myself as one-caring.⁶⁵ Genuine caring involves what Noddings calls "engrossment and motivational displacement." Engrossment means that the one-caring attends to the cared-for without judgment and evaluation, and she allows herself to be transformed by the other. In motivational

⁶⁰ V. Davion, note 31 above.

⁶¹ V. Davion, note 31 above, at 175.

⁶² S.L. Hoagland, note 30, at 110.

⁶³ S.L. Hoagland, note 30 above.

⁶⁴ N. Noddings, note 7 above, at 5.

⁶⁵ N. Noddings, note 7 above, at 82.

displacement the one-caring adopts the goals of the cared-for and helps the latter to promote them.⁶⁶

Caring involves stepping out of one's own personal frame of reference into the other's. When we care, we consider the other's point of view, his objective needs and what he expects of us. Our attention, our mental-engrossment is on the cared-for, not on ourselves. Our reasons for acting, then, have to do both with the other's wants and desires and with the objective elements of his problematic situation.⁶⁷

Drawing from this account of caring one might question, then, whether autonomy is desirable or even possible within the framework of care. From Noddings' perspective of care, autonomy can be perceived even as dangerous, because it is maximised through isolation from others, as others represent potential threats to our ability to define ourselves freely. But the more isolated we are, the less we are able to do what the ethics of care values, i.e. – to create and maintain relationships with particular others.⁶⁸ Whereas an autonomous individual defines herself, arguably, an adherent of the ethics of care allows herself to be defined by others.⁶⁹

I agree with the critics that there are at least two problems with this account of caring and its suitability for the human rights discourse. First, Noddings' account does not seem to include the idea of valuing the individuals themselves. Her account of care ethics misses an account of the individuals within caring relations as being important themselves.

Secondly, Noddings' approach fails to see that even if maintaining caring relationships is necessary for survival, it does not follow that all caring relations are good. As Davion points out, sometimes it is wrong to be one-caring if this involves motivational displacement and engrossment in someone whose projects are wrong: "If someone is evil and one allows herself to be transformed by that person, one risks becoming evil oneself. If the other's goals are immoral, and one makes those goals one's own, one becomes responsible for supporting immoral goals."⁷⁰

⁶⁶ N. Noddings, note 7 above, at 15-20 and 33-34.

⁶⁷ N. Noddings, note 7 above, at 24.

⁶⁸ G. Clement, note 8 above, at 16.

⁶⁹ G. Clement, note 8 above, at 21.

⁷⁰ V. Davion, note 31 above, at 162.

A third point that can be made about Noddings' account of care as essentially "other-regarding" care, is that it may result in a "smothering paternalism."⁷¹ Engster argues that Noddings' account assumes that needs are transparent to the caregiver in such a way that the caregiver's perceptions are privileged in the process of interpreting needs. Whatever the caregiver perceives as the needs of the other is taken as the other's true needs based upon their true relationship.⁷² An obvious example here can be a doctor who imposes his or her preferred treatment on the patient and claiming that he or she is doing it out of care.

What all these three instances of criticisms indicate is that according to Noddings' account, either autonomy does not have a place at all in the caring relationship, or it is one person's autonomy that is subsumed by the other.

However, while being material and accurate concerning the early writings and theories on the ethics of care, more recent works on care have emphasised that a mature care perspective involves concern as well for oneself and for one's own well-being within relations of care,⁷³ thereby stressing that care is not just other-oriented activity.⁷⁴ As Schwarzenbach puts it: "nothing in 'care' requires that the activity of care be pure altruism or self-sacrifice."⁷⁵ Engster argues, further, that caring for ourselves is also valuable in itself, since "we too are dependent creatures with biological and developmental needs that must be satisfied if we are to continue to live and function at a decent level."⁷⁶

Nor is care considered "non-rational", but true care must be intelligent and reasoned.⁷⁷ We need autonomy to evaluate potential and ongoing relationships. Otherwise we risk becoming simply tools or extensions of others.⁷⁸ As Davion proposes, one can consistently hold that caring is necessary for human survival and

⁷¹ D. Engster, note 11 above, at 116.

⁷² Ibid.

⁷³ D. Engster, note 8 above.

⁷⁴ D. Engster, "Rethinking Care Theory: The Practice of Caring and the Obligation to Care", (2005) 20(3) *Hypatia* 50-74, at 54. J.C. Tronto, note 8 above, at 103.

⁷⁵ S.A. Schwarzenbach, note 37 above, at 120.

⁷⁶ D. Engster, note 73 above, at 54.

⁷⁷ S.A. Schwarzenbach, note 37 above, at 120; See also J. Paley, "Virtues of autonomy: the Kantian Ethics of Care", (2002) 3 *Nursing Philosophy* 133-143, arguing for care ethics to incorporate Kantian insights that emphasises the cultivation of the powers of mind.

⁷⁸ C. Card, note 38 above, at 107.

distinguish between morally desirable and morally undesirable instances of caring.⁷⁹ Grace Clement builds on this point to argue that “genuine care” requires autonomy and concern for oneself, since an individual must first recognise her own distinct needs before she can recognise and empathise with those of others.⁸⁰

Sarah Hoagland points out that one cannot have a relation without there being at least two beings to relate.⁸¹ Even if one is the product of one’s relations, in making decisions about continuing caring relationships and about forming new ones, one acts out of a sense of oneself as a separate being from others. According to Hoagland:

Relation is central to ethics. However, there must be two beings, at least, to relate. Moving away from oneself is one aspect of caring, but it cannot be the only defining element. Otherwise, relationship is not ontologically basic, the other is ontologically basic, and the self ceases to exist in its own ethical right.⁸²

Therefore: “One who cares must perceive herself not just as both separate and related, but as ethically both separate and related.”⁸³ And if one cannot acknowledge the difference, one cannot evaluate the relationships one is in, and the projects of the others.

Caring and autonomy, hence, do not have to be in conflict with each other, but a more constructive way is to see them as mutually supportive and compatible. As more recent writings on care show, the ethics of care must allow for the autonomy of the caregiver as well as the care recipient. As Clement has put it: “One of the criteria for healthy caring relationships is that they allow for the autonomy of their members.”⁸⁴ Being a caring person or being engaged in a caring practice does not deny autonomy. In fact autonomy is a necessary condition for cultivating and learning the relevant abilities to care. Concurrently, being a care recipient does not entail that care can be imposed on her or him. Responding to one’s needs means paying attention to what these needs are from the perspective of the recipient.

⁷⁹ V. Davion, note 31 above, at 174.

⁸⁰ G. Clement, note 8 above, at 166.

⁸¹ S.L. Hoagland, note 30 above, at 110.

⁸² *Ibid.*, at 110-111.

⁸³ *Ibid.*, at 111.

⁸⁴ G. Clement, note 8 above, at 42.

5.2.5 Vagueness of care

The final criticism directed against the ethics of care I want to address is the alleged problem with the vagueness of the concept of care. The ethics of care is sometimes considered inadequate because of its inability to provide definite answers in cases of conflicting moral demands. One of the main problems is that it is not clear at all what caring amounts to. As Kuhse helpfully outlines, caring has

[c]onnotations of concern, compassion, worry, anxiety, and of burden; there are also connotations of inclination, fondness and affection; connotations of carefulness, that is, of attention to detail, of responding sensitively to the situation of the other; and there are connotations of looking after, or providing for, the other.⁸⁵

This sort of ambiguity has arguably made Emily Jackson reproach the ethics of care as “an inherently vague concept, which could be used to justify almost any plausible moral argument.”⁸⁶ She points out that in relation to euthanasia, for example, the ethics of care could be equally used to support or oppose legalised euthanasia. On one side, the ethics of care can be argued to be concerned about relieving distressed patients from enduring frightening or painful deaths. On the other, it is concerned about the possibility of vulnerable patients feeling pressurised into requesting euthanasia. To demonstrate the deficiency of care perspective to solve moral dilemmas, Jackson asks: “If an unconscious patient in urgent need of a blood transfusion is carrying a card stating that she is a Jehovah’s Witness who wishes to refuse the use of blood products, does an ethic of care demand that doctors respect her wishes and allow her to die, or should they treat her without consent and save her life?”⁸⁷

I agree with Jackson that “care” is a highly ambiguous notion. The fact that care and caring are ambiguous concepts counts, however, for little as an objection. Conceptions of freedom, autonomy, dignity, justice are also topics of endless, political, legal and moral debate.⁸⁸ The concept of dignity, for example, can be, and

⁸⁵ H. Kuhse, note 56 above, at 210.

⁸⁶ E. Jackson, note 32 above, at 22.

⁸⁷ Ibid.

⁸⁸ Gerald Dworkin has listed the various ways autonomy is used: “It is used sometimes as an equivalent of liberty, sometimes as equivalent to self-rule or sovereignty, sometimes as identical with

it has been, used as well as in support of legalising euthanasia as well as in opposing it.⁸⁹ Often principles of justice conflict, and there is no meta-principle to help to make a choice between them.⁹⁰ The insights of the ethics of care and its essential features are helpful as a normative and aspirational guide for describing our behaviour, and as providing tools with which to analyse a case or a legal dilemma. But it cannot provide ‘yes’ or ‘no’ answers to hypothetical questions about complex and sensitive moral issues. Furthermore, considering my aim to propose a concept of autonomy that aims to foster trust in interpersonal relationships, a large part of that aim is, then, targeted at preventing conflict. For example, in the case of *Evans*, I do not think that the Court could have reached another outcome for the parties involved. In the situation, where the parties found themselves, I do not see that the Court could have imposed fatherhood on Ms Evans’ ex-partner. However, that does not mean that the Ms Evans’ rights were not violated. The respective legislation in force was designed in a manner that allowed withdrawing one’s consent without paying any respect to the other party or upholding one’s promises.⁹¹ The ECtHR could have guided the Responding State to find a legal solution that would have directed the parties to infertility treatment to be more attentive and considerate to each other’s needs. As I see it, a better solution would be to limit the time until the donor has a right to withdraw one’s consent up until the moment of the creation of the embryo. In that way, a decision of becoming a parent would be, arguably, taken with more consideration and respect towards one’s partner.

the freedom of the will. It is equated with dignity, integrity, individuality, independence, responsibility, and self-knowledge. It is identified with qualities of self-assertion, with critical reflection, with freedom from obligation, with absence of external causation, with knowledge of one’s own interests...It is related to actions, to beliefs, to reasons for acting, to rules, to the will of other persons, to thoughts and to principles.” G. Dworkin, *The Theory and Practice of Autonomy*, CUP, 1988, at 10.

⁸⁹ See on this D. Beylerveld, R. Brownsword, *Human Dignity in Bioethics and Biolaw*, OUP, 2001, chapter 11.

⁹⁰ See L. Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA*, OUP, 2007.

⁹¹ See also Chapter 4, Section 4.4.5.

5.2.6 Interim conclusions

The chapter argues that the care perspective can provide a basis for a version of autonomy that, arguably, provides a more appropriate model for regulating human relationships in the area falling within the scope of Article 8 of the European Convention on Human Rights. By including the insights of care ethics – the social conception of the self, meeting the needs of particular others, the importance of relationships – into the concept of autonomy is, arguably, more inductive to trust and fostering trustworthiness than the present concept of individual autonomy. However, as the discussion above showed, several counterarguments can be provided for the usefulness of the ethics of care in human rights law. As I hope to have demonstrated, all of the criticisms are rebuttable.

In a way, the early writings on caring seemed to suffer from the same problem that is attributed to the ethics of justice and the “rights talk”, and that I attribute to individual autonomy as interpreted under the ECtHR case law – they are both too one-dimensional. The more recent writings on care have responded to the shortcomings that initially left caring and care ethics to be applied and practised only in the periphery of limited personal relationships. Paying attention to the context of a particular situation does not necessarily mean that caring can take place only in a private setting. Following from this, caring cannot be also associated solely with the female perspective and “women’s work” done at home. Care should be understood as an ethic for everyone, not just for women. The care ethicists have also responded to the limited view of early writings, which place the value of maintaining relationships above any individual desires or needs. Care ethics can be, instead, understood as the appreciation of healthy relationships, where autonomy of both the caregiver and the care receiver deserve respect.

5.3. Defining caring autonomy

The concept of caring autonomy proposed in this thesis is in certain ways a paradoxical term – it aims to capture free choice and moral obligations and responsibility not in conflict, but as complementary to each other and thus mutually

interdependent.⁹² Caring autonomy is a notion that aims to express both the values of autonomy and care simultaneously. It acknowledges the value of autonomy – the developed and exercised capacity to think and decide for oneself. Once more, I re-emphasise my position that there is nothing wrong with the assumption that autonomy is an important human good. We can and should value autonomy, but it should be equally made clear and acknowledged that we can develop and sustain autonomy only within a framework of relations of trust. In other words, in the essence of caring autonomy is the acknowledgement that self-realisation or self-fulfilment cannot happen in a vacuum. In one moment or another we all are vulnerable and depend on each other. Self-realisation is concurrently self-sustenance. Two alternative paths of action are possible here – at the expense of others or alongside with others. The former refers to co-habitation as a struggle for existence. In the latter case self-realisation takes place through giving and receiving care.

In order to suggest how the concept of caring autonomy should take shape in the practice of the Human Rights Court, I follow the same pattern used in Chapter 2 when analysing individual autonomy. Just as we asked about the person in the concept of individual autonomy, we ask about the person in the concept of caring autonomy. What kind of a human being is implied by caring autonomy? What kind of humanity does it disclose? Two ideas behind caring autonomy are crucial here.

First, the *subject* of caring autonomy is conceived as relational – a *relational self*, one that is constituted in part by relationships important to a person's autonomy and who equally needs relationships to exercise his or her autonomy.

Second, the exercise of one's autonomy requires not just an independent mind in decision-making, but the adoption of certain moral requirements for behaviour e.g. *responsiveness, attendance to other's needs, respect for other's autonomy and competence in meeting other's needs*.

As the previous chapter argued, the autonomous person as envisaged by the Human Rights Court – an independent, self-sufficient individual, one who is control of his or her life rather than being controlled by outside forces – is deficient if not detrimental

⁹² A.I. Tauber, "Sick Autonomy", (2003) 46(4) *Perspectives in Biology and Medicine* 484-495, at 490.

to trust in interpersonal relationships. The person behind caring autonomy provides a more promising basis for cultivating trusting relationships because it: a) assumes what MacIntyre has called “acknowledged dependency”⁹³ – that we all are, in one way or another, dependent on each other for acquiring and exercising our autonomy, and b) it aims to foster personal dispositions towards meeting others’ needs and responding to vulnerabilities that have been entrusted into one’s care – e.g. the “virtues of acknowledged dependency.”

5.3.1 Not independence, but interdependence

No man’s activity is completely so private as never to obstruct the lives of others in any way. Viewing persons as relational and as interdependent is central to caring autonomy. Inspired by the works of feminist philosophers, especially that of Virginia Held and Eva Kittay, Alasdair MacIntyre takes up the care ethicists’ challenge to emphasise the basic fact of human interdependence. I think his viewpoint makes a good starting point to regard people as relational. I, therefore, cite it at length:

We human beings are vulnerable to many kinds of affliction and most of us are at some time afflicted by serious ills. How we cope is only in small part up to us. It is most often to others that we owe our survival, let alone our flourishing, as we encounter bodily illness and injury, inadequate nutrition, mental defect and disturbance, and human aggression and neglect. This dependence on particular others for protection and sustenance is most obvious in early childhood and in old age. But between these first and last stages of our lives are characteristically marked by longer or shorter periods of injury, illness or other disablement and some among us are disabled for their entire lives.

These two related sets of facts, those concerning our vulnerabilities and afflictions and those concerning the extent of our dependence on particular others are so evidently of singular importance that it might seem that no account of the human condition whose authors hoped to achieve credibility could avoid giving them a central place. Yet the history of Western moral philosophy suggests otherwise. From Plato to Moore and since then there are usually, with some rare exceptions, only passing references to human vulnerability and affliction and to the connections between them and our dependence on others. Some of the facts of human limitation and of our consequent need of cooperation with

⁹³ A. MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues*, Duckworth, 1999, at 146.

others are more generally acknowledged, but for the most part only then to be put on one side.⁹⁴

I agree with the entirety of MacIntyre's statement. However, following Nedelsky, I think he underestimates the scope of our dependence and interdependence. Our dependence on others and vulnerability is indeed most obvious during childhood, illness, disability and old age. Infants and small children would not survive for very long or develop the basic capabilities necessary to survive without the care of some sort of parenting figures. But even during times of relative health and vigour, most individuals depend upon the care of family, friends and more distant others to help them satisfy their basic needs, develop or maintain their basic capabilities, or alleviate pain. Drawing from Hannah Arendt, Jennifer Nedelsky argues that some of our cognitive faculties, including both thinking and judging, require the presence of others. She argues that judging requires our ability to take the perspective of others – without others, and our ability to communicate with them, there would be no capacity for judgment.⁹⁵ Following Nedelsky, it is not just our material needs that render us dependent on others. Our basic emotional, imaginative and reasoning capabilities are not simply and fully developed by childhood's end, but continue to grow and evolve in our relations to others throughout our lives. In other word, our interdependence is not episodic, but a constant part of the human condition.⁹⁶ Behind every apparently autonomous individual is a constellation of care that works collectively to ensure livelihood, security and well-being. This constellation comprises a variety of actors and institutions at many levels of personal, societal and political life. In many instances, in the practice of the Human Rights Court this constellation is hidden from the view.

To summarise: the reality is that we are all unavoidably and deeply dependent upon others. We depend upon others for caring during childhood, sickness, disability and old age. Most of us depend upon others in our day-to-day lives and during times of particular hardship. During the course of life the balance of how much others are dependent on us and how much we are dependent on others shifts, but the fact

⁹⁴ Ibid., at 1.

⁹⁵ J. Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law*, OUP, 2011, at 28.

⁹⁶ Ibid.

remains that human life is deeply implicated in relations of dependency. This is part of being human.

If the self is understood as implicated in relations of dependency, this acknowledgement generally implies that in different ways people are vulnerable to each other's actions and choices. Those closer to us, of course, tend to be more vulnerable to our actions and choices. Because of this vulnerability, care ethicists have argued that there are attendant obligations between individuals to be sensitive towards, and care for, each other.⁹⁷ In other words, within the framework of caring autonomy, autonomous choices are made in response to obligations, responsibilities and meeting the needs of others. These involve both particular acts of caring and a general "habit of mind" to care that should inform an agent's moral life.

5.3.2 The virtues of care

Our interdependence means that there are attendant obligations between individuals to be sensitive towards, and care for, each other. The substance of this, however, remains too vague and its impact on how we view autonomy requires more elucidation. In the following I propose four elements of caring autonomy that every person should be entitled to and that every person should follow his- or herself. These elements of caring autonomy are constitutive of exercising one's autonomy in the sense that one cannot achieve successfully meeting others' and one's own needs without them. Correspondingly, "their recognised presence or absence necessarily affects our mutual willingness to be in each other's power and so necessarily affects the climate of trust we live in."⁹⁸ These elements are: attentiveness, responsiveness, respect for autonomy and competence.

Attentiveness. Attentiveness means recognising the ones around us and noticing when another person is in need.⁹⁹ The attentiveness to others requires an understanding of their/our story and its concrete detail. It requires knowledge of the situation of the person in need of help is in. Without this, one cannot know how it is

⁹⁷ G. Clement, note 8 above, at 73-74; D. Engster, note 8 above, at 40-44; A. Baier, *Moral Prejudices: Essays on Ethics*, Harvard University Press, 1994, at 130-152.

⁹⁸ A. Baier, note 97 above, at 178.

⁹⁹ D. Engster, note 8 above, at 30; J.C. Tronto, note 8 above, at 127; M.U. Walker, note 25 above.

with others towards whom I will act or what the meaning and consequences of any act will be.¹⁰⁰ An attentive person is, hence, also appropriately aware of how her attitudes and actions affect those around her, and if necessary she alters them so as not to cause fear, hurt, annoyance, insult or disappointment in others, particularly in those who hoped for cooperation or help.¹⁰¹

Attentiveness also usually involves an ability to anticipate additional needs that a person might have. If an individual is not attentive to others, he or she might meet their most obvious needs, but overlook underlying ones.¹⁰² For example nurses may provide the patients in the hospital with medicine, but do not cover them with blankets to keep them warm. The Human Rights Court might provide for a pregnant woman with additional complaints procedures to test her doctors' accountability, but not to see how the regulation would meet the needs of a woman with a severe type of myopia, who lives on a monthly disability pension and raises her three children alone.¹⁰³

Responsiveness. Responsiveness means engaging in some form of dialogue with others in order to discern the precise nature of their needs and monitoring their responses to our care to make sure they are receiving the care they actually need.¹⁰⁴ An individual who fails to engage with others when providing care for them, or fails to monitor their reactions to the care, will in the end usually be less effective than someone who remains open and responsive to them.¹⁰⁵ For example, health-care professionals who are receptive and responsive to the needs of patients see the patients as individuals with special needs, beliefs, desires and wants.

At this point it is important to note that caring autonomy does not involve only unidirectional activities, in which "an active care-giver does something to a passive

¹⁰⁰ M.U. Walker, note 25 above, at 18.

¹⁰¹ A.C. Baier, "Demoralization, Trust, and the Virtues", in C. Calhoun (ed) *Setting the Moral Compass: Essays by Women Philosophers*, OUP, 2004, 176-188, at 178.

¹⁰² D. Engster, note 8 above, at 30.

¹⁰³ Case of *Tysic v Poland* (App.5410/03), Judgment of 20 March 2007, para 31.

¹⁰⁴ D. Engster, note 8 above, at 54.

¹⁰⁵ D. Engster, note 8 above, at 30.

and dependent recipient,”¹⁰⁶ that only the care-giver has the obligation to be attentive and responsive to the needs of the recipient. Caring autonomy equally emphasises the role of the care-receiver for providing the carer with e.g. gratitude, acknowledgement, or emotional support.¹⁰⁷ As Herring notes: “The ‘cared for’ can have a range of powers they can exercise. The emotional well-being of the carer can depend on the attitude and response of the ‘cared-for’ persons to the carer. The ‘cared-for’ has the power to make the life of the carer unbearable.”¹⁰⁸ Responsiveness, hence, entails the ability to communicate: turning to each other, talking and listening and imagining possibilities together.¹⁰⁹

Respect for autonomy. Respect for the autonomy of others means that a good caregiver will not impose his or her own notions of care on others or refuse to meet their needs on the ground that they conflict with the care of self or others.¹¹⁰ Despite how close the relationship is and how strongly one is involved with his or her fellow person’s care, one must, nevertheless, recognise and respect this person as an autonomous subject. For example, if a doctor fails to recognise the otherness of the patient, then he or she is in danger of reducing the patient to a function of themselves or making the patient subservient to their self-development.

Respect for autonomy also involves respect for oneself. One has to take one’s own autonomy seriously in order to evaluate the relationships one is in, and in order to evaluate whether the needs of others can be met considering other legal or ethical arguments.

Respect for another person also includes respect for his or her rights. A commitment to rights is sometimes just an expression of care and rights-based practices often provide practical avenues to effectively channel care for others.¹¹¹ As Brennan argues: “sometimes what it is to care for a person is to take on concern for their

¹⁰⁶ M. Fine, C. Glendinning, “Dependence, Independence or Interdependence”, (2005) 25(4) *Ageing and Society* 601-621, at 619.

¹⁰⁷ See Chapter 4, Section 4.4.3.1. about the role of the importance of the knowledge of being trusted for sustaining trust.

¹⁰⁸ J. Herring, note 10 above, at 69.

¹⁰⁹ M.U. Walker, note 25 above, at 19.

¹¹⁰ J.C. Tronto, note 8 above, at 136.

¹¹¹ J. Spring, note 11 above, at 76

rights. Concern for the rights of a loved one does not mean that one cares only for an abstract moral concept. One can be concerned about rights because of the direct love for the other person.”¹¹²

Competence. Meeting others’ needs in today’s complicated world often means requiring special skills and technological or professional know-how. The tools have become too complex for us sometimes to do even the simplest repair works. Medicine, for example, has become so much more sophisticated, that almost every condition or treatment calls for the involvement of a different specialist. Intending to provide care, therefore, entails the ability to perform as expected, according to standards appropriate to the role or task in question. The caring work needs to be competently performed in order to meet others’ needs.

Within the care framework, competence is, however, not always technical, and it is not only being competent in skills. In the case of a family member or friend, the competence we expect them to display is what Jones terms as moral competence:¹¹³ we expect the person close to us “to understand loyalty, kindness and generosity, and what they call for in various situations.”¹¹⁴ In the case of physicians, not only are their skills and knowledge important, but also them “having a good will”¹¹⁵ – to pay attention to what they are doing, to take into account the feelings and concerns of their patients, to be “not merely competent doctors, but good doctors.”¹¹⁶ An important reason for including competence as a moral dimension of care is also to avoid the bad faith of those who would “take care of” a problem without being willing to do any form of care-giving.¹¹⁷

In this section I have suggested a list of virtues that should be the “maxim” behind one’s exercise of autonomy. Considering that the basis of caring autonomy lies in the acknowledgement of human interdependence, these virtues apply equally to those to whom we are vulnerable, and who are vulnerable to us.

¹¹² S. Brennan, “Reconciling Feminist Politics and Feminist Ethics on the Issue of Rights”, (1999) 30(2) *Journal of Social Philosophy* 260-275, at 271.

¹¹³ K. Jones, note 5 above, at 7.

¹¹⁴ Ibid.

¹¹⁵ A. Baier, note 5 above, at 235; K. Jones, note 5 above.

¹¹⁶ R.C. Solomon, F. Flores, note 4 above, at 84.

¹¹⁷ J.C. Tronto, note 8 above, at 133.

5.4. Implementing caring autonomy in the practice of the European Court of Human Rights

In this final section of this chapter I will consider how the concept of caring autonomy, proposed above, can be put into practice. For this purpose I will go back where I started and revisit, arguably, one of the most authoritative Article 8 autonomy-related cases in the Court's practice: *Pretty v the United Kingdom*.¹¹⁸ In the light of the above-presented discussion, I will consider how the Court could have approached this case in terms of people being relational and interdependent, and the obligations of care this interdependence calls for.

5.4.1 Revisiting *Pretty v the United Kingdom*

The facts of the case of *Pretty v the United Kingdom* as they were presented in the ECtHR judgment are clear. They were discussed at length in Section 1.2.3 of Chapter 1, and I will not reproduce the details of the case again save for emphasising the circumstances that I find important for the present purposes.

Caring autonomy understands persons are relational and interdependent, and this is the norm around which legal and ethical responses should be built. The analysis has to start, accordingly, with consideration of the relations in which Mrs Pretty was involved in, and, thereafter, it has to take into account the interests and needs of all the parties.

As we know from the case, Mrs Pretty was suffering from motor neurone disease, which severely affected the control and functioning of the muscles of her body. At the time of the application of the case to the Human Rights Court, the disease had progressed so far that it had left her practically paralysed from the neck down. She had virtually no decipherable speech and was fed through a tube. In other words, Mrs Pretty was a severely disabled person and she was wholly dependent on the care of her close ones and, at least to some extent, on that of the medical personnel. The fact that she could not take her own life on her own, and needed the help of her husband, only confirms the case of her dependency.

¹¹⁸ Case of *Pretty v the United Kingdom* (App.2346/02), Judgment of 26 April 2002.

This picture of Mrs Pretty contrasts to that of the findings of the Human Rights Court. According to the ECtHR, since Mrs Pretty was a “mentally competent adult who knows her own mind, who is free from pressure...cannot be regarded as vulnerable and requiring protection.”¹¹⁹ According to the parameters of individual autonomy, Mrs Pretty was, hence, to be adjudged independent and self-sufficient. Moreover, considering the space – or the lack of it – in the judgment dedicated to the ones closest to Mrs Pretty and, arguably, most affected by her decision, it gives an impression that Mrs Pretty was functionally alone – she was both emotionally and physically detached from others around her. Her right to self-determination and autonomy, her right to choose when and how to die, were rejected only because there might be other people who are at risk of outside influence and who could, then, be considered vulnerable, dependent and weak.¹²⁰ According to this case, independence is the positive thing, and is the norm; dependence, by contrast, is a negative thing, which implies weakness and only prohibits and restrains the independence of others. Framing the case in these terms, important issues become hidden. The ones affected by the decision have become “ignored and invisible.”¹²¹

Mrs Pretty was not physically alone. She was living with her husband of twenty-five years, their daughter and granddaughter. Since this is the only information available from the judgment about her close-ones, what follows can, in large part, only be a speculation. Following the reasoning in light of caring autonomy, the Court should, however, have paid attention to Mrs Pretty’s family members with as much attention as was given to Mrs Pretty, and to their needs in the context of their close relative’s wish to die.

To start in Mrs Pretty’s case, we have the Court’s finding that she is a mentally competent adult, who has freely made up her mind to commit suicide in order to avoid a distressing and undignified death. Individual autonomy does not ask for reasons behind one’s decisions concerning the intimate aspects of one’s life. I do not think that caring autonomy should do that either. What the latter should inquire into

¹¹⁹ *Pretty v the United Kingdom*, para 72.

¹²⁰ *Pretty v the United Kingdom*, para 74.

¹²¹ J. Herring, note 10 above, at 51.

is whether the terminally ill patient and her or his carers have received the care they need – whether the patient has been provided with adequate palliative care, including, for instance, care for possible depression that can be a common adjunct to a serious illness. This also entails whether patients have been provided with adequate information about the palliative options and/or prognosis.

Also the carers need to be taken care of. Looking after a severely disabled person normally limits the caregiver's options to engage fully in the labour market, restricts the caregiver's options to take part in activities outside of his or her home, etc. More and more often worries have been raised that care work has been unvalued and unnoticed.¹²² It is not given the same respect or recognition that other higher profile "economically productive" activities have. My point is that these aspects may have a direct impact on the person's choice to choose assisted suicide. In a world, where independence is the norm, a person in a condition similar to Mrs Pretty may understandably feel that she has become a burden and opt for death in order to save the caregiver or his or her family the trouble of looking after him or her. In this respect, Biggs argues that underlying Mrs Pretty's motivation to claim for her right to choose when and how to die, was the "desire to protect those they cared for."¹²³ Biggs further suggests that Mrs Pretty

[f]ought for her autonomy to be respected not only so that she might die in the manner and at the time of her choosing, which some would regard as selfish, but also in order to protect those they cared for and spare them the hurt associated with watching her die over a protracted period.¹²⁴

We do not know, and will never know, if that was the case, and if so, how much it affected Mrs Pretty's overall decision to end her life at her chosen time. The point being made here is that by looking more closely into the context of Mrs Pretty's predicament, by being attentive, responsive and respectful to her needs, maybe different options would have presented themselves, such as how to respond to her needs. Taking better care of the caregiver would arguably eliminate the patient's need to "protect those they care for."

¹²² J. Herring, note 10 above, at 66.

¹²³ H. Biggs, "A Pretty Fine Line: Life, Death, Autonomy and Letting it B", (2003) 11 *Feminist Legal Studies* 291-301, at 298.

¹²⁴ Ibid.

Next, although the case was framed as Mrs Pretty's right to autonomy and her right to make choices about her own body,¹²⁵ it was her husband who was asked by her to help her to commit suicide and who was, allegedly, wholly supportive of his wife's decision and willing to do what was asked.¹²⁶ I have no reason not to believe or doubt that the husband's motivations were honest and he sincerely wanted to help his wife. Probably, as her primary carer he saw how much pain and suffering the disease caused for his wife and that she was terrified about the prospect to undergo the final stages of the disease. I take it that Mr and Mrs Pretty's relationship can be characterised as a caring relationship, and in caring relations, it becomes sometimes difficult, if not impossible to separate the interests of the person who cares and the cared for.¹²⁷ But, as was discussed earlier, that does not mean that the caregiver can become a tool for the service of the recipient's autonomy. I think that Mr Pretty's part and his autonomy were critically overlooked by the Court. Caring autonomy should ask about the responsibilities the parties owe to each other in a context of a mutually supporting relationship. Was Mrs Pretty considerate of his needs and preferences, or that of her daughter and granddaughter, when making a decision?

Participation in assisted suicide is most likely not the easiest thing to endure. As Donchin argues:

For the death of someone who has been a significant force in one's life can tinge the fabric of familiar associations in unforeseen ways. The bed or chair in which she ended her life may continue to exert an unnerving effect long after the event. The trauma of that day prompts revisions of the entire history of the relationship adding new dimensions to the recollection of scenes from family life.¹²⁸

There might be for him further implications of the act to the relationships with other members of the family.

I do not propose that Mrs Pretty's decision cannot be valid simply because it, possibly, did not suit to the relatives' preferences. Rather, what I suggest is that the

¹²⁵ *Pretty v the United Kingdom*, para 66.

¹²⁶ *Pretty v the United Kingdom*, para 45.

¹²⁷ J. Herring, "The Legal Duties of Carers", (2010) 18 *Medical Law Review* 248-255, at 255.

¹²⁸ A. Donchin, "Autonomy, Interdependence and Assisted Suicide", (2000) 14(3) *Bioethics* 187-204, at 200.

other affected parties should be involved in the discussion of the case and their views should be heard. I think that this pays due respect and helps to maximise both the patient's and her or his relatives' autonomy. Sometimes, as Gilbar suggests, this might lead the patient voluntarily to make a different decision from the one she or he initially preferred and reach a compromise which suits to all of the parties.¹²⁹

Mrs Pretty asked her husband to help her to commit suicide. Obviously this is a request that must be difficult to take not only because your wife wants to die, but also because you are expected to execute it. Given the important part Mr Pretty had in her wife's autonomy request, it is then surprising that the Court did not include any consideration about his predicament.

The same argument can be extended to that of medical personnel, who according to one commentator were unwilling to help Mrs Pretty to commit suicide.¹³⁰ Only when she was unable to find a clinician to help her, she turned to her husband. Leaving for the moment aside the reason that the doctors simply refused to help Mrs Pretty because of the prospect of them facing criminal charges, what other reasons might come into consideration? One of the arguments possible to advance here is that this kind of request would conflict with the values embedded in their professional roles and their self-conception, which involve responsibilities to save lives rather than end lives. The question is, can the Human Rights Court compel doctors to assist patient dying? To pay due respect to all participants, caring autonomy would also require the consideration of the moral and psychological needs of the medical profession. Once more, this indicates, that a decision to choose assisted suicide cannot be limited to the patient or applicant alone. Other parties are involved and they should be given the recognition they need.

Even if in Mrs Pretty's case all indicates that her choice was voluntary and that it does not have a negative impact on anyone else close to her or treating her, her decision may still influence the family and doctor-patient relationships other than her own. The Court addresses this group of people as "weak and vulnerable." But in a

¹²⁹ R. Gilbar, "Family Involvement, Independence, and Patient Autonomy in Practice", (2011) 19 *Medical Law Review* 192-234, at 200.

¹³⁰ H. Biggs, note 123 above, at 294.

way we are all weak and vulnerable – we need to trust that our partners and doctors do not “propose” us to opt for “early” death, and we equally need to trust that our close ones do not opt for death as a daily choice like anything else.

Whereas my proposed conclusion to the *Pretty* case is not different in the end from the conclusion reached by the Human Rights Court, solving the case in the light of caring autonomy would entail going deeper into the contextual circumstances of the case and trying to include the autonomy interest of the other parties involved. In this way it becomes more clear that whatever personal, autonomous, decision we make, it affects most likely someone else as well.

5.5. Conclusion

This chapter has advocated for the Human Rights Court to adopt the concept of caring autonomy, based on the insights of the ethics of care, to approach issues under Article 8 of the European Convention on Human Rights. Including the insights of care ethics into the concept of autonomy, arguably, adds value to the concept by providing a richer view of the human condition and by offering, thereby, a more adequate and appropriate basis for human interaction in matters pertaining to different areas of private life – e.g. reproduction issues, medical decision-making etc.

The concept of caring autonomy proposed in this chapter is based on the relational account of self and focuses on the moral obligations and responsibility our interconnectedness and vulnerability call for. Caring autonomy recognises that we are not independent or self-sufficient, but interdependent on each other in various ways. In one moment or another we all are vulnerable and depend on each other. Because of this interdependence, one’s autonomy can flourish only in an atmosphere of trust, which is sustained by caring relationships. As the chapter proposes this means that we have to be attendant, responsive and respectful towards each other and provide competent care when needed. These virtues of caring autonomy create a more appropriate basis for interpersonal relationships than the virtues of independence and self-sufficiency.

CONCLUSION

In her analysis about whether the proliferation of rights serves always best the idea of justice and human well-being, Marta Cartabia concludes that rights have their place, but their place is limited.¹ She argues that most privacy rights focus on freedom of choice and autonomy while leaving obscured other dimensions of the human experience: “needs and desires, relationships and responsibilities, virtues and care, are all elements abound to fall outside the scope of the rights approach.”² As she says, “rights require not hurting others, but they do not prompt a positive move towards other, they fall short of encouraging care and concern about others.”³ The multiplication of rights turns, according to Cartabia, human relationships into being more confrontational and people become more litigious in their personal interaction.⁴

This thesis agrees with Cartabia on one account, but disagrees with her on another. While the thesis sets out an argument against the present interpretation of the concept of autonomy under the European Court of Human Rights Article 8 jurisprudence, it also proposes a new reading of the concept that is rooted in an acknowledgment and appreciation of human interdependence. I agree with Cartabia that the current autonomy related case law of the Human Rights Court depicts individuals under a specific angle, insisting on some limited, if important features, and leaves out aspects that are equally integral to the human condition. However, I do not share with her the view that, therefore, the place of rights has to be necessarily limited or not applicable to certain contexts or relationships.

The culture of rights need not be a culture of complaint and litigiousness, or a culture of confrontational atomistic individuals fighting for the fulfilment of their egotistical desires. While I share the critics’ worries that rights are often constructed in overly

¹ M. Cartabia, “The Age of ‘New Rights’”, *Straus Working Paper 03/10*, available at <http://nyuStraus.org/index.html>, 45.

² Ibid., at 44.

³ Ibid., at 31.

⁴ Ibid., at 43.

individualistic ways that may foster a culture of self-interested individuals, I think that rights can successfully embody a richer view of the human condition. It is possible to conceive a system of rights as a framework of rules that can be drawn upon to promote fundamental human interests without a culture in which individuals seek only their own self-advancement. Human beings are both uniquely individual and essentially social creatures. Capturing both of these features of humanity means that rights may be instrumental for a variety of purposes, including the capacity to confer benefits on others within a culture, which includes a role for autonomous judgment by morally good people as to how and when and in what way they exercise their autonomy rights.⁵

This thesis is inspired by the view that law is a powerful means of structuring human relations. It is informed by the idea that law is part of the cultural environment that shapes and impacts the dispositions and behaviour of those operating within its sphere. As such, through its expressive functions, law can serve as conveying or promoting socially valued attitudes, norms and mores. As Conor Gearty has said: “‘Human rights’ is a phrase that comes to mind when we want to capture in words a particular view of the world that we share with others and that we aspire to share with still greater numbers of people.”⁶ But this particular view of the world cannot be taken as a self-evident good, whenever it carries the human rights label on it. Human rights – their practice and expressions – need to be challenged and discussed, in order for them to reflect more accurately what is valuable about them and whether they live up to the values they promote. To inquire and challenge the value of the concept of autonomy under the European Convention on Human Rights Article 8 framework was the main aim of this work.

When the Human Rights Court chooses a particular concept of autonomy to furnish its Article 8 case law, it simultaneously chooses a particular way of organising relationships within family life, medical settings or other close personal encounters. By choosing a particular concept of autonomy, the Human Rights Court guides us to

⁵ T. Campbell, “Human Rights: A Culture of Controversy”, (1999) 26(1) *Journal of Law and Society* 6-26, at 11-12.

⁶ C. Gearty, *Can Human Rights Survive?*, CUP, 2006, at 4.

behave in certain ways that are deemed appropriate for an autonomous person, and, correspondingly guides us away from other behaviours towards one another.

The thesis argued that following the prevailing political, legal and socio-cultural ideas and ideals about autonomy, the ECtHR chose the notion of individual autonomy to underlie the interpretation of Article 8 guarantees.

Individual autonomy under the practice of the Human Rights Court expresses and gives high regard to the values of independence, self-sufficiency, and the ability to conduct one's life in a manner of one's own choosing. The thesis contended that adopting this kind of normative picture of individual conduct is highly problematic in the context of personal relationships. The "moral space" in which interpersonal relationships reside is not necessarily coincident with a set of rules that may successfully govern interactions between state and individual or between that of strangers. This picture of morality might work adequately as long as we are in fact talking about interactions between strangers, especially strangers whose relationship is adversarial. The concept of individual autonomy may fit into the relationship of state versus individual, but it acts differently when applied to medical or family settings. It overlooks many kinds of questions that are crucial to morality, and ignores the features of personal relationships that make them personal and worth having. Hence, by exalting a rather thin and limited conception of autonomy into the centrepiece of more and more areas of personal life, there is not just the worry that it gives us a distorted picture of the human condition, there is also the worry that something valuable gets lost. Placing autonomy at the heart of doctor-patient relationships, or regulating the relationships within the family or partnership circle, substitutes the, so far, implicit expectations of care with explicit contractual rules of calculability and self-defensiveness. Because of these inherent limits, individual autonomy cannot be constitutive of social life and interpersonal relationships and is potentially detrimental for the quality of interpersonal relationships. Furthermore, thinking in terms of independence and self-sufficiency may blind us to the extent of our reliance upon others. As we regard ourselves more and more as self-constituted individuals, we may fail to realise how we depend upon each other not only in early childhood, in old age or in cases of illness, but in multiple situations and formations.

The thesis further challenged the appropriateness of the concept of individual autonomy to underlie the interpretation of Article 8 guarantees from the sociological perspective. The inquiry presented a, perhaps paradoxical, conclusion that the more “autonomous” we become, the more uncertain our lives are. The disappearance of guaranteed jobs for life, the increased visibility of diverse sexualities and identities, the elective and ambiguous character of interpersonal relationships and institutionalised pressures on self-sufficiency, have all contributed to a growth of anxiety and uncertainty in people’s lives. It was maintained that autonomy claims originated from uncertainty caused by the decline of traditional ways of living, dealing with the abundance of choices presented to us by the modern world, and the institutionalised pressure to live an autonomous, individualised life. It was the search for security, confidence and control, the thesis argued, that lies at the origins of autonomy claims. By casting human beings in the contexts of family life and medicine as self-sufficient individuals and guardians of their own interests, the ECtHR, however, only exacerbates the problem. In this way, the Court upholds and enforces the negative side of individualisation, rather than responds to any of the problems the present social transformations create and cause for personal lives and human well-being. However, the way the Human Rights Court responds to these new disputes, potentially, carries a crucial message in defining the new type of social commitments that inevitably come about when previous bonds and rules break down. It was argued that the indeterminacy of social action coupled with an ever-widening range of social interaction and interdependence, makes trust increasingly relevant for social interaction. In fact, it was suggested that the capacity for autonomy and the ability to exercise one’s autonomy is dependent on the existence of trust in interpersonal relationships.

While trust cannot be directly willed nor demanded by law, it was argued that through law’s expressive functions certain legal regulations are likely to support, create, or extend trust in interpersonal relationships.

The problem with individual autonomy and the particular approach taken by the European Court of Human Rights is that it imports the mechanisms of enhancing trustworthiness, and hence, the value of trust, in a manner suitable in economic

impersonal relationships rather than in noneconomic and personal ones. As a consequence, the particular construction of autonomy starts with the premise that distrust rather than trust is the factual basis or reality of contemporary relationships. An unforeseen and unexpected consequence of this approach is that the ECtHR does not engage in building trust, but it encourages distrust. And distrust only feeds more distrust. Further, introducing more accountability measures to guarantee individual autonomy potentially causes the reduction of trust since these measures reduce the internal motivations of professionals, such as doctors, for trustworthy action. If people receive signals that they are not trustworthy, they are likely to become less trustworthy, and *vice versa*. Finally, the approach the Court has taken towards breaches of trust – deception, lying and the breaking of promises – is not supportive towards building trust. The way law stands at the moment under the regulations of individual autonomy acts as a social incentive to deceive, and is therefore not conducive to trust.

In its final chapter, the thesis proposed that in order to cultivate practices of trust, to enhance social cohesion and to strengthen trustworthiness in interpersonal relationships, the European Court of Human Rights should take the approach of advocating the language of caring autonomy – a concept of autonomy informed by the insights of the ethics of care.

The concept of caring autonomy proposed in this chapter is based on the relational account of self and focuses on the moral obligations and responsibility our interconnectedness and vulnerability call for. Caring autonomy recognises that we are not independent or self-sufficient, but interdependent on each other in various ways. In one moment or another we all are vulnerable and depend on each other. Because of this interdependence, caring autonomy acknowledges that one's autonomy can flourish only in an atmosphere of trust, which is, in turn, sustained by caring relationships. As the chapter further proposes, this means that we have to be attendant, responsive and respectful towards each other and provide competent care when needed.

The thesis concludes with the note that considering the impact human rights have on structuring human relations it is important not just to challenge whether rights are

needed, but what kind of rights are needed and what kind of rights are appropriate in what setting. It is also important not just to see their limited role in certain contexts under certain construction, but to recognise their full potential, including the role that rights can play as an expression of care and trust. Although there is much more work to be done to refine the concept of caring autonomy and its application in human rights law, I hope to have shown that it is possible and needed to go beyond the individualistic concept of autonomy if the exercise of autonomy still matters to us.

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